APPENDIX C

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on Pleadings.

(c) Motion for Judgment on the Pleadings.
After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

APPENDIX D

APPENDIX D

TITLE 16

Telecommunications Systems, Cable Systems, and Private Communication Systems

TITLE 16

TELECOMMUNICATION SYSTEMS, CABLE SYSTEMS, AND PRIVATE COMMUNICATION SYSTEMS

Chapters:

16.01 General

16.02 Special Rules Applicable to Telecommunications Facilities and Telecommunications Service Providers

16.03 Special Rules Applicable to Open Video Systems

16.04 Special Rules Applicable to Cable Television Systems

16.05 Private Communications Facilities

16.06 Miscellaneous

Chapter 16.01

GENERAL

Sections:

16.01.1 Purpose.

16.01.2 Policy guidelines.

16.01.3 Definitions.

16.01.3.1	Generally
16.01.3.2	Affiliate
16.01.3.3	Application Fee
16.01.3.4	Cable Service
16.01.3.5	Cable System
16.01.3.6	City
16.01.3.7	City Manager
16.01.3.8	Communications Facility
16.01.3.9	Communications System
16.01.3.10	Construction, Operation or Repair
16.01.3.11	Franchise
16.01.3.12	Franchise Area
16.01.3.13	Franchisee
16.01.3.14	FCC
16.01.3.15	Gross Revenues
16.01.3.16	License
16.01.3.17	Open Video System, or "OVS"
16.01.3.18	Operator
16.01.3.19	Overhead Facilities
16.01.3.20	Person
16.01.3.21	Private Communications System
16.01.3.22	Private Communications System Owner
16.01.3.23	Programmer
16.01.3.24	Public Rights-of-Way
16.01.3.25	Reseller

16.01.3.26 Telecommunications Service
16.01.3.27 Telecommunications System
16.01.3.28 Title
16.01.3.29 Transfer
16.01.3.30 Underground Facilities

16.01.4 Franchise required.
16.01.4.1 Purpose and characteristics
16.01.4.2 Franchise requirement
16.01.4.3 Exceptions
16.01.4.4 Nature of grant

16.01.5 Cost Recovery.
16.01.5.1 Purpose
16.01.5.2 Compensation for use
16.01.5.3 Payments required
16.01.5.4 Payment of Costs
16.01.5.5 Exceptions
16.01.5.6 Billable work order
16.01.5.7 Application to persons that provide different types of services
16.01.5.8 General rules for payment of fees and assessments

16.01.6 General conditions upon use of public rights-of-way.
16.01.6.1 Responsibility for costs
16.01.6.2 Construction procedures and placement of facilities; obligations to minimize interference with use of public rights-of-way
16.01.6.3 Relocation of facilities
16.01.6.4 Facility subject to inspection; operator must provide information
16.01.6.5 Plans for and publicizing work

16.01.7 Protection of the City and residents.

16.01.7.1 Indemnification
16.01.7.2 Insurance
16.01.7.3 Performance/payment bonds
16.01.7.4 Security fund

16.01.8 Enforcement and remedies.
16.01.8.1 City Manager responsible for administration
16.01.8.2 Applications for Franchises and Licenses
16.01.8.3 Minimum contents of every franchise or License
16.01.8.4 Penalties
16.01.8.5 Revocation, reduction of term, or forfeiture of franchise or license
16.01.8.6 Effect of termination or forfeiture
16.01.8.7 Remedies Cumulative
16.01.8.8 Access to books and records
16.01.8.9 Retention of records; relation to privacy rights
16.01.8.10 Reports
16.01.8.11 Maps
16.01.8.12 Compliance with laws
16.01.8.13 Reservation of authority
16.01.8.14 No waiver
16.01.8.15 Title not a contract

16.01.9 Transitional provisions.
16.01.9.1 Persons operating without a franchise or license
16.01.9.2 Persons holding Franchises or licenses
16.01.9.3 Persons holding leases for property in the right-of-way
16.01.9.4 Persons with pending applications
16.01.9.5 Transitional rules to be narrowly interpreted

16.01.10 Special rules for government entities.

16.01.11 No waiver.

16.01.1 Purpose.

The purpose of this title is to:

16.01.1.1 Establish a local policy concerning telecommunications systems, cable systems, open video systems, and private communication systems that use the public rights-of-way;

16.01.1.2 Establish a policy that promotes availability of high-quality and diverse telecommunications services to City residents, businesses, the City, and other public institutions; promotes the availability of diverse, multimedia information resources to the community; provides for the development of a communications infrastructure that provides opportunities for more open government, enhancing educational opportunities throughout the community, providing public access to the communications infrastructure, and building a stronger community; while ensuring that the City has the authority to act to protect the public, safety, and welfare in the face of a rapidly-changing industry that is placing increasing demand on public resources;

16.01.1.3 Establish clear and nondiscriminatory local guidelines, standards and time frames for the exercise of local authority with respect to the regulation of the use of public rights-of-way by telecommunications operators, cable operators, open video system operators, private communication operators, and Resellers, and their respective facilities and licenses;

16.01.1.4 Promote competition in communications;

16.01.1.5 Minimize unnecessary local regulation of providers and services;

16.01.1.6 Encourage the provision of advanced and competitive telecommunications, cable or open video system services on the widest possible basis to the businesses, institutions and residents of the City;

16.01.1.7 Permit and manage reasonable access to the public rights-of-way of the City for communications purposes on a competitively neutral basis;

16.01.1.8 Conserve the limited physical capacity of the public rights-of-way held in public trust by the City;

16.01.1.9 Assure that the City's current and ongoing costs of granting and regulating private access to and use of the public rights-of-way are fully paid by the persons seeking such access and causing such costs;

16.01.1.10 Secure fair and reasonable compensation to the City and the residents of the City, in a non-discriminatory manner, for permitting private use of the public rights-of-way;

16.01.1.11 To encourage economic development while preserving aesthetic and other community values and preventing proliferation of above-ground facilities;

16.01.1.12 Assure that all persons providing telecommunications, cable, or open video facilities or services within the City comply with the ordinances, rules and regulations of the City;

16.01.1.13 Ensure the ability of the City to obtain sufficient information from persons subject to its jurisdiction to enable effective decisions regarding their access to City rights-of-way and effective management of activity in the rights-of-way;

16.01.1.14 Assure that the City can continue to fairly and responsibly protect the public health, safety and welfare; and

16.01.1.15 Enable the City to discharge its public trust consistent with rapidly evolving Federal and State regulatory policies, industry competition and technological development. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.2 Policy guidelines.

The administration of this title shall be governed by the following telecommunications and video programming policy guidelines:

The City of Tacoma supports efforts to establish an open, competitive marketplace for telecommunications and video programming services. The City promotes and encourages competition for voice, data, video, and video programming services that make the latest and best technology available and keep service prices affordable for all City residents and businesses. An integral component of this open marketplace is the consistent application of regulations to all telecommunications and video programming providers and the preservation of local authority over matters of local impact.

The following policy guidelines express the commitment of the City to support telecommunications and video programming services and to manage its rights-of-way proactively while balancing the interests and needs of the community:

1. The City will manage access to the public rights-of-way for telecommunications purposes in a non-discriminatory, competitively neutral and non-exclusive way to the extent required under applicable law and, to the extent allowed under applicable law, to receive fair compensation. The City will also manage access to its public rights-of-way for video programming purposes in a non-discriminatory,

competitively neutral and non-exclusive way to the extent required by applicable law and, to the extent allowed by applicable law, to receive fair compensation.

- The public interest will be protected by collecting full and fair market compensation, associated fees, taxes, administrative costs, and construction costs for use of the rights-of-way.

2. Telecommunications and video programming franchises will be managed to preserve the integrity of the City's infrastructure, ensure efficient use of City property and ensure compliance with City ordinances, rules and regulations.

- Minimal disruption of public property will be ensured.

- Telecommunications and video programming franchisees will be required to place their facilities underground in situations where existing utility services are underground and/or whenever existing overhead facilities go underground and/or whenever City policy so requires.

3. Investments by telecommunications and video programming providers will be encouraged in order to enhance economic development programs and provide jobs, opportunities, and choices for its citizens.

- Public and private partnerships are encouraged to meet public service needs and to actively pursue State, Federal, and private grant funding that offers public benefit in advanced telecommunications.

4. Universal access to telecommunications and video programming services is encouraged for all residents and businesses. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.030 Definitions.

16.01.3.1 Generally

16.01.3.2 Affiliate
16.01.3.3 Application Fee
16.01.3.4 Cable Service
16.01.3.5 Cable System
16.01.3.6 City
16.01.3.7 City Manager
16.01.3.8 Communications Facility
16.01.3.9 Communications System
16.01.3.10 Construction, Operation or Repair
16.01.3.11 Franchise
16.01.3.12 Franchise Area
16.01.3.13 Franchisee
16.01.3.14 FCC
16.01.3.15 Gross Revenues
16.01.3.16 License
16.01.3.17 Open Video System, or "OVS"
16.01.3.18 Operator
16.01.3.19 Overhead Facilities
16.01.3.20 Person
16.01.3.21 Private Communications System
16.01.3.22 Private Communications System Owner
16.01.3.23 Programmer
16.01.3.24 Public Rights-of-Way
16.01.3.25 Reseller
16.01.3.26 Telecommunications Service
16.01.3.27 Telecommunications System
16.01.3.28 Title
16.01.3.29 Transfer
16.01.3.30 Underground Facilities

16.01.3.1 "Generally." For the purposes of this title, the following terms, phrases, words, and abbreviations shall have the meanings given herein, unless otherwise expressly stated. When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number; and words in the singular number include the plural number; and the

masculine gender includes the feminine gender. The words "shall" and "will" are mandatory, and "may" is permissive. Unless otherwise expressly stated, words not defined in this title shall be construed consistent with Title 47 of the United States Code, and, if not defined therein, their common and ordinary meaning. References to governmental entities (whether persons or entities) refer to those entities or their successors in authority. If specific provisions of law referred to herein are renumbered, then the reference shall be read to refer to the renumbered provision. References to laws, ordinances or regulations shall be interpreted broadly to cover government actions, however nominated, and include laws, ordinances and regulations now in force or hereinafter enacted or amended.

6.01.3.2 "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.

16.01.3.3 "Application Fee" means the charge specified in Sections 16.01.5.3.1 and designed to recover the City's actual costs in processing applications for franchises or licenses, including applications for the transfer thereof.

16.01.3.4 "Cable service" means"

(A) The one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

16.01.3.5 "Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple

subscribers within a community, but such term does not include:

(A) A facility that serves only to retransmit the television signals of one or more television broadcast stations;

(B) A facility that serves subscribers without using any public right-of-way;

(C) A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II (Common Carriers) of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;

(D) Any facilities of any electric utility used solely for operating its electric utility systems; or

(E) An open video system that is certified by the FCC.
A reference to a cable system includes pedestals, equipment enclosures (such as equipment cabinets), amplifiers, power guards, nodes, cables, fiber optics and other equipment necessary to operate the cable system.

16.01.3.6 "City" means the City of Tacoma and all departments, divisions, and agencies thereof, including the Department of Public Utilities.

16.01.3.7 "City Manager" means the City Manager or the City Manager's designee.

16.01.3.8 "Communications facility" means a device which alone or as part of an aggregation of devices is capable of transmitting signals from place to place.

16.01.3.9 "Communications system" refers to a telecommunications system, cable system, or open video system.

16.01.3.10 "Construction, operation or repair" and similar formulations of that term means the named actions interpreted broadly, encompassing, among other things, installation, extension, maintenance, replacement of components, relocation, undergrounding, grading, site preparation, adjusting, testing, make-ready, and excavation.

16.01.3.11 "Franchise" refers to the authorization granted by the City to an operator of a telecommunications system, cable system, or an open video system under this title giving the operator the non-exclusive right to occupy the space, or use facilities upon, across, beneath, or over any public right-of-way in the city, to provide a specified service within a franchise area. Any franchise shall be issued in the form of an ordinance, and must be accepted by the franchisee to become effective in the time and manner specified in the City Charter, Tacoma Municipal Code, or the franchise ordinance. Such franchise shall not include or be a substitute for:

(i) Any other permit or authorization required for the privilege of transacting and carrying on a business within the City required by the ordinances and laws of the City;

(ii) Any permit, agreement or authorization required in connection with operations on or in public streets or property, including by way of example and not limitation, street cut permits;

(iii) Any permits or agreements for occupying any other property of the City or private entities to which access is not specifically granted by the franchise including, without limitation, permits and agreements for placing devices on or in poles, conduits, other structures, or railroad easements, whether owned by the City, including the Department of Public Utilities, or a private entity; or

(iv) The right to place devices in the right-of-way, such as pay telephones, for end user use in terminating or originating transmissions.

By way of example, and without limiting the foregoing, this title shall not be read to diminish or in any way affect the authority of the Department of Utilities to control and charge for the use of the Light, Water, and Belt Line Divisions' real estate, fixtures or personal property. Therefore, any person who desires to use such property must obtain additional approvals, franchises, or agreements for that purpose, as may be required by the City.

16.01.3.12 "Franchise area" means the area of the City that a franchisee is authorized to serve by the terms of its franchise or by operation of law.

16.01.3.13 "Franchisee" refers to a person holding a franchise granted by City ordinance.

16.01.3.14 "FCC" means the Federal Communications Commission or its successor.

16.01.3.15 "Gross Revenues" means any and all revenue, of any kind, nature or form, as more particularly defined under the succeeding chapters in this title.

16.01.3.16 "License" refers to the legal authorization, terminable at will, to use a particular, discrete, and limited portion of the public rights-of-way to construct, operate, or repair a Communications Facility or a Private Communications System. The term license shall not mean or include:

(i) Any other permit or authorization required for the privilege of transacting and carrying on a business within the City required by the ordinances and laws of the City;

(ii) Any permit, agreement, or authorization required in connection with operations on public streets or property,

including by way of example and not limitation, street cut permits;

(iii) Any permits or agreements for occupying any other property of the City or private entities to which access is not specifically granted by the license including, without limitation, permits and agreements for placing devices on or in poles, conduits, other structures, or railroad easements, whether owned by the City, including the Department of Public Utilities, or a private entity; or (iv) the right to place devices in the right-of-way, such as pay telephones, for end-user use in originating and terminating transmissions.

16.01.3.17 "Open Video System" or "OVS" refers to a facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service, which includes video programming, which is provided to multiple subscribers within a community, and which the Federal Communications Commission or its successor has certified as compliant with Part 76 of its rules, 47 C.F.R., Part 76, as amended from time-to-time.

16.01.3.18 "Operator" when used with reference to a system, refers to a person (a) who provides service over a Communications System and directly or through one or more Affiliates owns a significant interest in such facility; or (b) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a facility. A person that operates under agreement a telecommunications system or a specific portion of a telecommunications system to provide telecommunications services shall be treated as an operator for purposes of this title.

16.01.3.19 "Overhead facilities" refers to electric utility and communications facilities located above the surface of the

ground, including the underground supports and foundations for such facilities.

16.01.3.20 "Person" includes any individual, corporation, partnership, association, joint stock company, trust, or any other legal entity, but not the City.

16.01.3.21 "Private communications system" means a facility placed in whole or in part in the public rights-of-way for the provision of communications in connection with a person's business, but not encompassing in any respect the provision of telecommunications services.

16.01.3.22 "Private communications system owner" means a person that owns or leases a private communications system.

16.01.3.23 "Programmer" refers to any person who provides video programming to subscribers over a cable system or an open video system, excluding video programming delivered not for a charge over a public, educational, or governmental ("PEG") channel.

16.01.3.24 "Public Rights-of-Way" mean the public streets and easements which, under the City Charter, the Tacoma Municipal Code, City ordinances, and applicable laws, the City has authority to grant franchises, permits, or licenses for use thereof or has regulatory authority thereover, and as may be more specifically defined in the franchise, license, or permit granting any right to or use thereof, excluding railroad rights-of-way, airport, and harbor areas. public rights-of-way for the purpose of this title do not include buildings, parks, poles, or similar facilities or property owned by or leased to the City, including, by way of example and not limitation, structures in the public rights-of-way such as utility poles and light poles.

16.01.3.25 "Reseller" refers to any person who resells a telecommunications service, for which he makes a separate charge, provided over a telecommunications system, where

that person does not own or lease the underlying telecommunications system used for the transmission.

16.01.3.26 "Telecommunications service" means the transmission for hire of information in electronic or optical form, including, but not limited to, voice, video, or data, whether or not the transmission medium is owned by the provider itself. Telecommunications service includes telephone service but does not include cable service or over-the-air broadcasts to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto.

16.01.3.27 "Telecommunications system" means a tangible facility that is used to provide one or more telecommunications services, any portion of which occupies public rights-of-way. The term telecommunications system by way of example, and not limitation, includes wires, equipment cabinets, guys, conduit, radio transmitting towers, poles, other supporting structures, and associated and appurtenant facilities used to transmit telecommunications signals. The term telecommunications system includes all devices mounted on light poles in the public rights-of-way through which Telecommunications services are originated or terminated. An open video system is not a telecommunications system to the extent that it provides only video services; a cable system is not a telecommunications system to the extent that it provides only cable service.

16.01.3.28 "Title," when used in the context of referring to this title of the Tacoma Municipal Code, shall mean this Title 16 of the Tacoma Municipal Code and Chapters 16.01 through 16.06 of this title 16.

16.01.3.29 "Transfer" means any transaction in which:

(i) All or a portion of the Communications System is sold or assigned (except a sale or assignment that results in

removal of a particular portion of the facility from the public rights-of-way);

(ii) There is any change, acquisition, or direct or indirect transfer of control of the franchisee or licensee; or

(iii) The rights and/or obligations held by the franchisee or licensee under the franchise or license are transferred, sold, assigned, or leased, in whole or in part, directly or indirectly, to another party. It will be presumed that any transfer or cumulative transfer of voting interest of 10 percent or more is transfer of control within the meaning of (ii). In succeeding provisions of this title, all these activities are referred to as franchise transfers.

16.01.3.30 "Underground facilities" refers to electric utility and communications facilities located under the surface of the ground, excluding the underground foundations or supports for Overhead Facilities. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.4 Franchise required.

16.01.4.1 Purpose and characteristics. In order to enable the City to treat persons providing similar services similarly, as may be appropriate to comply with applicable law and considering differences in circumstances, and to comply with requirements of federal law which may require the City to separate its authority over cable systems from its authority over other providers of telecommunications services, the City requires individual franchises for the provision of particular services. The revocation of a franchise for one particular service in and of itself will not affect the authority of a franchise holder to continue to occupy the rights-of-way to provide services for which it holds other franchises. No franchise shall be exclusive. The issuance of a franchise shall not affect the City's right to itself construct, operate, or repair any communications facility, with or without a franchise.

16.01.4.2 Franchise Requirement. An operator of a cable system must obtain a franchise prior to constructing a cable system or providing cable service; an operator of a telecommunications facility must obtain a franchise prior to constructing a telecommunications facility or providing telecommunications services; an operator of an open video system must obtain a franchise before constructing an open video system or providing services via an open video system. The fact that a particular franchised communications facility may be used for multiple purposes does not obviate the need to obtain a franchise for other purposes. By way of illustration and not limitation, a cable operator of a cable system must obtain a cable franchise and, should it intend to provide telecommunications services over the same facilities, must also obtain a telecommunications franchise. A reseller or a programmer uses the public rights-of-way subject to the condition that it may be required to obtain a license upon request of the City, and to pay compensation for such use as required by the City, subject to limits imposed by state law. No franchise shall become effective without the franchisee signing an acceptance of the ordinance which grants it the franchise.

16.01.4.3 Exceptions. Subject to the requirements of the City Charter, a franchise requirement and the franchise application process may be waived in whole or in part for a telecommunications system where the City determines the use of the public rights-of-way is de minimis. For such facilities, the City may issue a license. In addition, every private communications system owner must obtain a license. Every license shall include or be read to include, as if stated there in, a reservation of rights by the City to require the licensee to obtain a franchise if the City determines that the license is being used in a manner that creates a competitive advantage for that operator or otherwise unduly discriminates in favor of such entity. In

any case, the license must provide that if limitations of the license are violated, the entity must pay at least the corresponding maximum franchise fee required by this title.

16.01.4.4 Nature Of Grant. Neither a franchise nor a license shall convey title, equitable or legal, in the public rights-of-way. The right granted is only the right to occupy those portions of the public rights-of-way to which the City has the right to grant access, for the purposes and for the period stated in the franchise or license, and, subject to the limitations in this section and elsewhere in this title, the right may not be subdivided or subleased. Every franchise shall be:

16.01.4.4.1 Interpreted in a manner that conforms to the requirements of Article VIII of the Tacoma City Charter;

16.01.4.4.2 Deemed to include all the provisions that are required to be in a franchise under that Article, as if fully set forth in the franchise;

16.01.4.4.3 Deemed to provide for forfeiture under the circumstances set forth in the Charter, as well as under the provisions of this title and any franchise ordinance thereunder; and

16.01.4.4.4 Construed to exclude the grant of any rights in any easement granted for or in favor of public utility facilities or operations, unless the franchise or license shall expressly state otherwise.

No reference herein, or in any franchise or license, to a public right-of-way shall be deemed to be a representation or guarantee by the City that its interest or other right to control the use of such property is sufficient to permit its use for such purposes, and a franchise shall be deemed to grant no more than those rights which the City may have the undisputed right and power to give. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.5 Cost recovery.

16.01.5.1 Purpose. To ensure that the City, as far as possible, is compensated for the rights granted, and receives fair market value for use of public rights-of-way over which it exercises control, or which is held in public trust; and in order that the City is compensated for expenses arising from the use of those public rights-of-way; the City shall require persons using its public rights-of-way to provide cable service, telecommunications service, open video system services, and private communications system owners to pay compensation as provided in this title.

16.01.5.2 Compensation For Use. Every operator of a communications system shall pay a franchise fee or license fee as required by this title except as provided in Section 16.01.5.5. Every operator that is subject to the exceptions in Section 16.01.5.5 and every reseller or programmer uses the rights-of-way subject to the condition that, should the exception ever be eliminated or modified, that operator or reseller or programmer shall be obligated to pay such compensation that would otherwise be required in the absence of the exception.

16.01.5.3 Payments Required. Except as otherwise expressly provided in this title, every cable operator; every operator of a telecommunications system; every operator of an open video system; and every private communications owner must:

16.01.5.3.1 Pay an application fee for the consideration of an application for issuance, renewal, transfer, or modification of a franchise or license in an amount that allows the City to recover its actual administrative expenses incurred in receiving, reviewing, processing, considering, denying, or approving the issuance, renewal, transfer, or modification of a franchise or license. The initial deposit of the application fee for the consideration of an application for issuance, renewal, transfer, or modification of a

franchise shall be in the amount of $5,000, or for a license in the amount of $1,000, which deposit shall be submitted with the Application. The City may, as costs are incurred, draw upon the deposit to recover its administrative costs, including, but not limited to, the reasonable cost of outside consultants retained by the City related to the City's consideration and processing of a franchise or license. The City Manager, at any time, may require the applicant to deposit additional sums if it appears that the initial deposit or subsequent deposits will be exhausted prior to the final action by the City relating to the consideration by the City of an application for issuance, renewal, transfer, or modification of a franchise or license. The applicant will not be entitled to further consideration by the City of its requested action until such time as the additional deposit required by the City Manager has been deposited with the City. In the event the amount of the deposit of an applicant is in excess of the amount of the administrative expenses of the City related to the action requested, then the applicant shall be entitled to a return of any such excess amount.

16.01.5.3.2 Pay the fees required by Sections 12.02.050 and 12.02.060 of Title 12 of this Code;

16.01.5.3.3 Establish a billable work order to cover costs of issuing permits and inspecting facilities, as provided in Section 16.01.5.6;

16.01.5.3.4 In the event the City determines by resolution or ordinance that an impact assessment shall be assessable, pay such impact assessment to reflect, as far as permissible under applicable law, the damage caused or expected to be caused to the rights-of-way by the installation of the facility; however, any operator that pays the full franchise fee required under this title need only pay the higher of (a) the franchise fee; or (b) the impact assessment.

16.01.5.4 Payment Of Costs. Nothing in this section relieves any Communications System operator of its obligation to bear costs associated with its operations, including but not limited to costs it incurs in moving facilities at the direction of the City.

16.01.5.5 Exceptions. The franchise fees required under this title need not be paid:

16.01.5.5.1 If State law or the City charter requires otherwise; or during any transition period as described in Section 16.01.9 for a current franchise holder. This exception shall be read narrowly; an operator that is engaged in one line of business that is subject to this exception, shall not be excused from paying the franchise fee for its other lines of business. In cases subject to this exception, the highest permissible fee shall be paid.

16.01.5.5.2 In the case of a cable system, a telecommunications system, or an open video system that is not subject to an exception under Section 16.01.4.3 or Section 16.01.5.5.1, and is not designed to provide service in the City, and that does not provide service in the City, or where a particular facility is licensed pursuant to Section 16.01.4.3, the City may establish a fee in lieu of the fees in the franchise specified in this title that recovers an amount, at least equivalent to the market value of the property used in the City.

16.01.5.6 Billable Work Order. Concurrently with the acceptance of a franchise or license and annually thereafter, each communications system operator shall file an annual billable work order with the City Manager to cover the City's actual costs including but not limited to administration, and inspection of the operator's physical facilities and activities in the public rights-of-way. By January 31 of each year, every communications system operator shall deposit with the City Treasurer an amount

calculated by the City Manager to cover the cost of work likely to be performed by the City under that billable work order during the succeeding 12 months. The City may draw upon that deposit to cover its costs. In the event excess funds remain in the operator's billable work order account at the end of the year, such excess shall be refunded or credited to the next year's billable work order. The City Manager at any time may require a communications system operator to replenish the amount deposited if it appears that the initial deposit or subsequent deposits will be exhausted during the course of the year. No permit issued shall be valid or of any force or effect if an operator fails to make the required deposits.

16.01.5.7 Application to Persons That Provide Different Types of Services. The fact that a fee is paid on one type of service provided over a communications system, does not excuse an operator from its duty to pay fees on other types of services provided over that facility as required by this title. As an example, and not as a limitation of the foregoing, a cable operator that pays a franchise fee on revenues derived from the provision of cable services must pay a fee under Chapter 16.02 (Special Rules Applicable to telecommunications systems) to the extent that it provides telecommunications services; likewise, the operator of a telecommunications system must pay a franchise fee under Chapter 16.04 to the extent it provides cable services to subscribers via a cable system.

16.01.5.8 General Rules For Payment Of Fees And Assessments.

16.01.5.8.1 Unless otherwise specified in a franchise or a license, franchise and license fees shall be paid to the City monthly, and not later than 25 days after the end of the month for which the fee or assessment is owed.

16.01.5.8.2 Unless a franchise or license provides otherwise, each franchise or license fee payment shall be accompanied by a statement showing the manner in which the fee was calculated. The statement shall be in a form approved by the City.

16.01.5.8.3 No acceptance by the City of any franchise or license fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of such franchise fee payment be construed as a release of any claim the City may have for additional sums payable.

16.01.5.8.4 The franchise or license fee payment is not a payment in lieu of any tax, fee or other assessment except as specifically provided in this title, or as required by applicable law. By way of example, and not limitation, permit fees and business license taxes are not waived and remain applicable.

16.01.5.8.5 Within 90 days following the end of the calendar year, each person which paid a franchise fee based upon gross revenues shall submit a statement, certified as true by the chief financial officer of such person, setting forth gross revenues of the communications system, by category, and describing what revenues were included and excluded in the fee calculation, and any adjustments made to gross revenues. If payments are late, in addition to paying any applicable penalties or damages, the person that owes the fee shall pay interest on the amount owed at the rate of 1 percent per month or faction thereof compounded monthly.

16.01.5.8.6 The City may, from time to time and upon reasonable advance written notice, inspect and audit any and all books and records reasonably necessary to the determination of whether fees have been accurately computed and paid. The operator must provide the books and records or copies thereof to the City or advance the

costs of travel and per diem for an employee or employees of the City to inspect and copy such books and records at any location more than 50 miles outside the City at which such books and records are kept in the course of business, in accordance with the procedures set forth in Section 6.68.320 of this Code.

16.01.5.8.7 Notwithstanding the foregoing, in the event that a person that is obligated to pay a fee ceases to provide service for any reason (including as a result of a transfer), such person shall make a final payment of any amounts owed to the City within 10 calendar days of the date its operations in the City cease, and shall provide a statement of Gross Revenues for the calendar year through the dates operations ceased which statement shall contain the information and certification required by Section 16.01.5.8.5. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.6 General conditions upon use of public rights-of-way.

16.01.6.1 Responsibility For Costs. Except as expressly provided otherwise, any act that a communications system operator, its contractors or subcontractors are required to perform under this Section 16.01.6 shall be performed at their cost. If a communications system operator fails to perform work that it is required to perform within the time provided for performance, the City may perform the work and bill the communications system operator therefor. The communications system operator shall pay the amounts billed within 30 days.

16.01.6.2 Construction Procedures And Placement Of Facilities; Obligation To Minimize Interference With Use Of Public Rights-Of-Way.

16.01.6.2.1 The construction, operation, and repair of communications facilities are subject to the supervision of all of the authorities of the City that have jurisdiction in

such matters and shall be performed in compliance with all laws, ordinances, departmental rules and regulations and practices affecting such system. By way of example, and not limitation, this includes zoning codes and safety codes and City construction standards, including the most current version of the Standard Specifications for Road, Bridge and Municipal Construction, as prepared by the Washington State Department of Transportation (WSDOT) and the Washington State Chapter of American Public Works Association (APWA); the most current version of the APWA Amendments to Division One, and the most current version of the City of Tacoma Amendments thereto. In addition, the construction, operation, and repair shall be performed in a manner consistent with high industry standards. persons engaged in the construction, operation, or repair of communications facilities shall exercise reasonable care in the performance of all their activities and shall use commonly accepted methods and devices for preventing failures and accidents that are likely to cause damage, injury, or nuisance to the public or to property.

16.01.6.2.2 Construction, operation, or repair of a communications system shall not commence until all required permits have been properly filed for and obtained from the proper City officials and all required permits and associated fees paid. In any permit so issued, the City may impose as a condition of the granting of the permit such conditions and regulations as may be necessary to the management of the rights-of-way, including, by way of example and not limitation, for the purpose of protecting any structures in the public rights-of-way, for the proper restoration of such public rights-of-way and structures, and for the protection of the City and the public and the continuity of pedestrian and vehicular traffic.

16.01.6.2.3 Operators of communications systems must follow City-established requirements for placement of

facilities in public rights-of-way, including the specific location of facilities in the public rights-of-way, and must in any event install facilities in a manner that minimizes interference with the use of the public rights-of-way by others, including others that may be installing communications facilities. The City may require that facilities be installed at a particular time, at a specific place, or in a particular manner as a condition of access to a particular right-of-way; may deny access if an operator is not willing to comply with the City's requirements; and may remove, or require removal of, any facility that is not installed in compliance with the requirements established by the City, or which is installed without prior City approval of the time, place, or manner of installation and charge the operator of the facility for all the costs associated with removal; and may require a person using the rights-of-way to cooperate with others to minimize adverse impacts on the rights-of-way through joint trenching and other arrangements.

16.01.6.2.4 Upon order of the City Manager, all work which does not comply with the permit, the approved plans or specifications for the work, or the requirements of this title or other applicable law shall be removed.

16.01.6.2.5 To minimize disruption of public passage or infrastructure, to forestall or relieve exhaustion of rights-of-way capacity, or to protect environmentally sensitive areas, the City may require as a condition of issuing any rights-of-way permit for erection of new poles or construction of underground conduit, the installation of which requires excavation of or along any traveled way that the franchisee, licensee, or holder of the rights-of-way permit emplace pole space or empty conduits in excess of its own present and reasonably foreseeable requirements for the purpose of accommodating the City and/or other franchisees and licensees.

16.01.6.2.6 To the extent possible, operators of communications system shall use existing poles and conduit existing at the time of permitting in installing their system. Additional poles may not be installed in the right-of-way, nor may pole capacity be increased by vertical or horizontal extenders, without the permission of the City Manager.

16.01.6.2.7 Unless otherwise specified in a franchise, all facilities shall be constructed, installed, and located in accordance with the following terms and conditions:

16.01.6.2.7.1 A communications system operator with written authorization from the City Manager to install overhead facilities shall attach its communications system to existing poles only, and then only if surplus space is available.

16.01.6.2.7.2 Whenever all existing utilities are located underground in an area in the City, a communications system operator that wishes to place its facility in the same area must also locate its communications system underground, including facilities, such as drops, which cross private property.

16.01.6.2.7.3 Whenever the owners of poles locates or relocates underground within an area of the City, every communications system operator in the same area shall concurrently relocate its facilities underground.

16.01.6.2.7.4 Whenever an electric utility opens a trench for the purpose of installing or relocating facilities, all communications system operators shall concurrently relocate their facilities underground and if they use the same trench share the cost.

16.01.6.2.7.5 The City Manager may, for good cause shown, exempt a particular system or facility or group of facilities from the obligation to locate or relocate facilities underground, where relocation is impractical, or where the

interest in protecting against visual blight can be protected in another manner. Nothing in the paragraph prevents the City from ordering communications facilities to be located or relocated underground under other provisions of the this code.

16.01.6.2.7.6 Nothing herein prohibits the City from ordering all communication systems to be placed underground in a particular area at any time, it being the intent that the number and extent of overhead facilities and the visual pollution resulting therefrom will, over time, be reduced and eventually, to the extent feasible, eliminated.

16.01.6.2.8 Any and all public rights-of-way, public property, or private property that is disturbed or damaged during the construction, operation or repair of a communications facility shall be promptly repaired by the communications system operator that disturbed or damages the public rights-of-way, public property or private property. Public property and public right-of-way must be restored to the satisfaction of the City or to a condition as good or better than before the disturbance or damage occurred.

16.01.6.2.9 No tree trimming shall be performed without the permission of the City and other affected authorities, and any tree trimming must be performed in strict accordance with the City Code.

16.01.6.2.10 Within 48 hours after notice from the City, a communications system operator shall remove any graffiti on any part of its communications system (including by way of example and not limitation) equipment cabinets. If the operator fails to do so, the City may remove the graffiti and bill the operator for the cost thereof.

16.01.6.3 Relocation Of Facilities.

16.01.6.3.1 A communications system operator shall, by a time specified by the City, protect, support, temporarily

disconnect, relocate, or remove any of its property when required by the City by reason of traffic conditions; public safety; public right-of-way construction; public right-of-way repair (including resurfacing or widening); change of public right-of-way grade; construction, installation or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of government-owned communications system, public work, public facility, or improvement or any government-owned utility; public right-of-way vacation; or for any other purpose where the work involved would be aided by the removal or relocation of the communications facility. Collectively, such matters are referred to below as the "public work."

16.01.6.3.1.1 Except in the case of emergencies, the City shall provide written notice describing where the public work is to be performed at least one week prior to the deadline by which a communications system operator must protect, support, temporarily disconnect, relocate or remove its facilities. A communications system operator may seek an extension of the time to perform such tasks where they cannot be performed in a week even with the exercise of due diligence, and such request for an extension shall not be unreasonably refused.

16.01.6.3.1.2 In the event of an emergency, or where a communications facility creates or is contributing to an imminent danger to health, safety, or property, the City may protect, support, temporarily disconnect, remove, or relocate any or all parts of the communications facility without prior notice, and charge the communications system operator for costs incurred.

16.01.6.3.2 If any person that is authorized to place facilities in the rights-of-way requests another communications system operator receiving the request to protect, support, temporarily disconnect, remove, or relocate its facilities to accommodate the construction, operation, or repair of the

facilities of such other person, the communications system operator shall, after 30 days' advance written notice, take action to effect the necessary changes requested. Unless the matter is governed by a valid contract or a state or federal law or regulation, or unless the communications facility that is being requested to move was not properly installed, the reasonable cost of the same shall be borne by the person requesting the protection, support, temporary disconnection, removal, or relocation and at no charge to the City, even if the City makes the request for such action.

16.01.6.3.3 A communications system operator shall, on the request of any person holding a valid permit issued by a governmental authority, temporarily raise or lower its wires to permit the moving of buildings or other objects. The expense of such temporary removal or raising or lowering of wires shall be paid by the person requesting the same. A communications system operator shall be given not less than seven days' advance notice to arrange for such temporary wire changes.

16.01.6.3.4 A communications system operator may abandon any property in place upon written notice to the City. However, if the City determines within 90 days of the receipt of notice of abandonment from the operator, that the safety, appearance, functioning or use of the public right-of-way and facilities in the public right-of-way will be adversely affected, the operator must remove its property by a date specified by the City.

16.01.6.4 Facility Subject To Inspection; Operator Must Provide Information. Every communications facility shall be subject to the right of periodic inspection and testing by the City to determine compliance with the provisions of this title, a franchise or license agreement, or other applicable law. The City shall have the right, upon request, to be notified and present when the communications system is tested by the operator. Each operator must

respond to requests for information regarding its system and plans for the system as the City may from time to time issue, including requests for information regarding its plans for construction, operation and repair and the purposes for which the plant is being constructed, operated, or repaired.

16.01.6.4.1 Underground Services Alert. Each operator of a communications system that places facilities underground shall be a member of the regional notification center for subsurface installations (Underground Services Alert) and shall field mark the locations of its underground communications facilities upon request. The operator shall locate its facilities for the City at no charge.

16.01.6.5 Plans For and Publicizing Work.

16.01.6.5.1 Work shall be publicized as the City may direct from time to time. The publication of work may be used to notify the public and operators of other communications systems, of the impending work, in order to minimize inconvenience and disruption to the public.

16.01.6.5.2 Each communications system owner shall provide the City a plan for any initial system construction, or for any substantial rebuild, upgrade or extension of its facility, which shall show its timetable for construction of each phase of the project, and the areas of the City that will be affected.

16.01.6.5.3 The City Manager may from time to time, when the City receives application for a permit to use a particular route, or upon the City Manager's own initiative, designate by published order a route or proposed route for installation of communications facilities and may (1) require all persons who wish to emplace underground facilities along that route or any part thereof to install them during a specified period and (2) otherwise prohibit emplacement of such facilities along the route or any part thereof for 24 months or after such other, longer period as is

necessary to protect the public. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.7 Protection of the City and residents.

16.01.7.1 Indemnification.

16.01.7.1.1 No franchise or other authorization to use the rights-of-way issued to a communications system operator or a private communications system owner shall be valid or effective until and unless the City obtains an adequate indemnity from such operator. The indemnity must at least:

16.01.7.1.1.1 Release the City from and against any and all liability and responsibility in or arising out of the construction, operation or maintenance of the communications facility. Each communications facility operator must further agree not to sue or seek any money or damages from City in connection with the above mentioned matters;

16.01.7.1.1.2 Indemnify and hold harmless the City, its trustees, elected and appointed officers, agents, and employees, from and against any and all claims, demands, or causes of action of whatsoever kind or nature, and the resulting losses, costs, expenses, reasonable attorneys' fees, liabilities, damages, orders, judgments, or decrees, sustained by the City or any third party arising out of, or by reason of, or resulting from or of the acts, errors, or omissions of the communications system operator, or its agents, independent contractors or employees related to or in any way arising out of the construction, operation or repair of the facility.

16.01.7.1.1.3 Provide that the covenants and representations relating to the indemnification provision shall survive the term of any franchise or other authorization and continue in full force and effect as to the party's responsibility to indemnify.

16.01.7.2 Insurance. No franchise or other authorization to use the rights-of-way issued to a communications system operator or a private communications system owner shall be valid or effective until and unless the City obtains assurance that such operator (and those acting on its behalf) have adequate insurance. At a minimum, the following requirements must be satisfied:

16.01.7.2.1 A communications system operator shall not commence construction or operation of the facility without obtaining all insurance required under this paragraph and approval of such insurance by the Risk Manager of the City, nor shall a communications system operator allow any contractor or subcontractor to commence work on its contract or sub-contract until all similar such insurance required of the same has been obtained and approved. The required insurance must be obtained and maintained for the entire period the communications system operator has facilities in the rights-of-way, and for a period thereafter as specified in the minimum coverages described below. If the operator, its contractors, or subcontractors do not have the required insurance, the City may order such entities to stop operations until the insurance is obtained and approved.

16.01.7.2.2 Certificates of insurance, reflecting evidence of the required insurance and naming the City as an additional insured, shall be filed with the City's Risk Manager. For entities that are entering the market, the certificates shall be filed prior to the commencement of construction and once a year thereafter, and as provided below in the event of a lapse in coverage. For entities that have facilities in the rights-of-way as of the effective date of this title, the certificate shall be filed within 60 days of the effective date of this title, annually thereafter, and as provided below in the event of a lapse in coverage, unless a

pre-existing franchise provides for filing of certificates in a different manner.

16.01.7.2.3 These certificates shall contain a provision that coverages afforded under these policies will not be canceled until at least 30 days' prior written notice has been given to the City. Policies shall be issued by companies authorized to do business under the laws of the State of Washington. Financial Ratings must be no less than "A" in the latest edition of "Bests Key Rating Guide", published by A.M. Best Guide.

16.01.7.2.4 In the event that the insurance certificate provided indicates that the insurance shall terminate or lapse during the period of the franchise or license, then in that event, the communications system operator shall furnish, at least 30 days prior to the expiration of the date of such insurance, a renewed certificate of insurance as proof that equal and like coverage has been or will be obtained prior to any such lapse or termination during the balance of the period of the franchise or license under which the communications system operates.

16.01.7.2.5 A communications system owner or operator, and its contractors or subcontractors engaged in work on the operator's behalf in, on, under or over public rights-of-way, shall maintain the following minimum insurance. The City shall be named as an additional insured on the general liability and automotive policies.

16.01.7.2.5.1 Comprehensive general liability insurance to cover liability bodily injury and property damage. Exposures to be covered are: premises, operations, products/completed operations, and certain contracts. Coverage must be written on an occurrence basis, with the following limits of liability:

A. <u>Bodily Injury</u>

1. Each occurrence $1,000,000
2. Annual aggregate $3,000,000

B. Property Damage

1. Each occurrence $1,000,000
2. Annual aggregate $3,000,000

C. Personal Injury

Annual aggregate $3,000,000

D. Completed operations and products liability shall be maintained for two years after the termination of the franchise or license (in the case of the communications system owner or operator) or completion of the work for the communications system owner or operator (in the case of a contractor or subcontractor).

E. Property damage liability insurance shall include coverage for the following hazards: X - explosion, C - Collapse, U - underground.

16.01.7.2.5.2 Workers' compensation insurance shall be maintained during the life of this contract to comply with statutory limits for all employees, and in the case any work is sublet, each communications system operator shall require the subcontractors similarly to provide workers' compensation insurance for all the latter's employees unless such employees are covered by the protection afforded by each communications system operator. Each communications system operator and its contractors and subcontractors shall maintain during the life of this policy employers liability insurance. The following minimum limits must be maintained:

A. Workers' Compensation Statutory

B. Employer's Liability $ 500,000 per occurrence

16.01.7.2.5.3 Comprehensive Auto Liability

A. Bodily Injury

1. Each occurrence $1,000,000
2. Annual aggregate $3,000,000

B. Property Damage

1. Each occurrence $1,000,000
2. Annual aggregate $3,000,000

Coverage shall include owned, hired, and non-owned vehicles.

16.01.7.2.6 Each communications system operator shall hold the City, its agents, and employees, harmless on account of claims for damages to persons, property or premises arising out of its construction, operation or repair of its communications system and name the City as an additional insured.

16.01.7.2.7 In every franchise or license agreement, the City shall reserve the right to require any other insurance coverage it deems necessary depending upon the exposures.

16.01.7.3 Performance/payment bonds. Every operator of a communications facility shall be required to obtain performance bonds and, if necessary, payment bonds to ensure the faithful performance of its responsibilities under this title and any franchise or license, including a sufficient amount to cover removal of facilities and/or restoration of City facilities within right-of-way. The amount of the performance and payment bonds shall be set by the City Manager or may be set in a franchise ordinance in light of the nature of the work to be performed and is not in lieu of any additional bonds that may be required through the permitting process. The bond shall be in a form acceptable to the City Attorney. The City may from time to time increase or decrease the amount of the required

performance bond to reflect changes in risks to the City and to the public.

16.01.7.4 Security Fund. Every communications system operator shall establish a cash security fund or provide the City an irrevocable letter of credit in the amount of $50,000, to secure the payment of fees owed, to secure any other performance promised in a franchise, and to pay any taxes, fees or liens owed to the City. The letter of credit shall be in a form and with an institution acceptable to the City's Director of Finance and in a form acceptable to the City Attorney. Should the City draw upon the cash security fund or letter of credit, it shall promptly notify the communications system operator, and the communications system operator shall promptly restore the fund or the letter of credit to the full required amount. This security fund/letter of credit may be waived or reduced by the City for a franchisee or licensee where the City determines in its discretion that a particular franchisee's or licensee's operations are sufficiently limited that a security fund/letter of credit is not necessary to secure the required performance. The City may from time to time change the amount of the required security fund/letter of credit to reflect changed risks to the City and to the public, including delinquencies in taxes or other payments to the City. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.8 Enforcement and remedies.

16.01.8.1 City Manager responsible for administration. The City Manager is responsible for enforcing and administering this title, and the City Manager is authorized to give any notice required by law or under any franchise, including by way of example and not limitation, a notice required under 47 U.S.C. § 546. The City Manager is also authorized to seek information from any communications system operator, to establish forms for submission of applications and other information, and to take all other

actions necessary or appropriate to the administration of this title or any franchise. franchises may only be denied, issued or revoked by action of the City Council.

16.01.8.2 Applications for Franchises and Licenses.

16.01.8.2.1 An application must be filed for an initial franchise or license, for a transfer, or for renewal of a franchise or license. Each entity that is required to hold a franchise or license must submit an application therefor to the City Manager in accordance with the requirements of this title. To be accepted for filing, an original and six copies of a complete application for a franchise, and an original and six copies of a complete application for a license must be submitted, showing the routes the applicant proposed to use. All applications shall be available for public inspection. All applications shall include the names and addresses of persons authorized to act on behalf of the applicant with respect to the application.

16.01.8.2.2 An application may be filed by any person on that person's own initiative or in response to a request for proposals. The City Manager is authorized to issue requests for proposals from time to time.

16.01.8.2.3 Every application shall be accompanied by an initial deposit in the amounts of $5,000 for franchises and $1,000 for licenses.

16.01.8.2.4 In addition, an applicant that is awarded a franchise or license, shall pay to the City a sum of money sufficient to reimburse it for all publication expenses incurred by it in connection with the granting of a franchise or license pursuant to the provisions of this title. Such payment shall be made by delivery of payment to the City Treasurer within 30 days after the City furnishes the franchisee or licensee with a written statement of such expenses.

16.01.8.2.5 No franchise shall become effective until all required fees and costs are paid.

16.01.8.2.6 Notwithstanding any other provision of this title, pledges in trust or mortgages of the assets of a franchised or licensed communications system to secure the construction, operation, or repair of the system may be made without application and without the City's prior consent; except that no such arrangement may be made if it would in any respect under any condition prevent the communications system operator or any successor from complying with the franchise or license and applicable law, nor may any such arrangement permit a third party to succeed to the interest of the operator, or to own or control the communications system, without the prior consent of the City. Any mortgage, pledge or lease shall be subject to and subordinate to the rights of the City under any franchise, this title, or other applicable law.

16.01.8.2.7 The City Council may, in its sole discretion which is hereby reserved, (1) approve or disapprove a license; and (2) require such terms and conditions in the license agreement as deemed in the best interest of the City. The City Manager or City Council may request such additional information from an applicant for a license as deemed appropriate in order to proceed with consideration of the application.

16.01.8.3 Minimum Contents of Every Franchise or License. In addition to satisfying the other applicable requirements of this Chapter, every franchise or license for a communications system shall contain the following provisions:

16.01.8.3.1 The franchise or license shall provide that neither the granting of any franchise or license, or any provision thereof, shall constitute a waiver or bar to the exercise of any governmental right or power, police power,

or regulatory power of the City as may exist at the time the franchise is issued or thereafter be obtained.

16.01.8.3.2 The franchise or license shall only authorize occupancy of the right-of-way to provide the services and for the purposes described in the franchise or license.

16.01.8.3.3 A franchise or license shall be a privilege that is held in the public trust and personal to the original franchisee. The franchise or license shall ensure that no transfer of the franchise or license may occur, directly or indirectly, without the prior consent of the City; except as contemplated by Section 16.01.8.2.6 or as otherwise expressly provided in this title.

16.01.8.3.4 The franchise or license shall ensure that any person placing a communications system in the public rights-of-way will not unlawfully discriminate in hiring, in contracting, or in the provision of services.

16.01.8.3.5 The franchise or license shall contain appropriate provisions for enforcement, compensation, and protection of the public, consistent with the other provisions of this title.

16.01.8.3.6 The franchise or license shall be for a specified term, set forth in the franchise or license. No franchise issued under this title shall be for a term of longer than ten years, unless the Council determines that a longer period would be in the City's interest. No license issued under this title shall be for a term of longer than five years.

16.01.8.3.7 Such other terms as are required by the City Charter.

16.01.8.3.8 License shall be discretionary.

16.01.8.4 Penalties. Any person found to have occupied or carried out activities in the public rights-of-way without first having obtained or having in effect a valid franchise, license, or permit as required by this title shall be guilty of a

misdemeanor and shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding 90 days or by both such fine and imprisonment. Each day that any such occupancy or activity shall continue in violation of this title shall constitute a separate offense.

16.01.8.5 Revocation, Reduction of Term, or Forfeiture of Franchise or License.

16.01.8.5.1 Licenses shall be revocable at will.

16.01.8.5.2 Where, after notice and providing the franchisee an opportunity to be heard (if such opportunity is timely requested by a franchisee), the City finds that the facility is being maintained or operated in violation of this title or in substantial violation of the terms of the franchise, the City may make an appropriate reduction in the remaining term of the franchise or revoke the franchise. The City Manager is authorized to establish and conduct a proceeding that complies with the requirements of this Section 16.01.8.5.2, and to issue a recommended decision, but any such decision may be appealed to the City Council. Any appeal must be filed within 30 days of the decision of the City Manager or it shall be deemed waived. Notwithstanding the foregoing, the franchise may only be revoked if the franchisee (1) was given notice of the default; and (2) 30 days to cure the default; and (3) the franchisee failed to cure the default, or to propose a schedule for curing the default acceptable to the City where it is impossible to cure the default in 30 days. The required notice may be given before the City conducts the proceeding required by this paragraph. No opportunity to cure is required for repeated violations, and fraud shall be deemed incurable.

16.01.8.5.3 Notwithstanding the foregoing, Section 16.01.8.5.2, the City may declare a franchise forfeited without opportunity to cure or the notice required by Section 16.01.8.5.2 where the franchisee (1) fails to begin to

exercise its rights under the franchise within a period specified in the franchise ; (2) stops providing service it is required to provide in the franchise; (3) without the prior consent of the City, transfers the franchise; (4) fails to pay the annual occupancy fees or franchise fees owed hereunder; or (5) defrauds or attempts to defraud the City or the operator's customers. However, a franchisee shall have the right to receive 30 days' prior notice of an intent to declare a franchise forfeited, and shall have the opportunity to show cause why the franchise should not be forfeited.

16.01.8.5.4 Notwithstanding the foregoing Sections 16.01.8.5.1-1.8.5.3, a franchise or license will automatically terminate by force of law 120 calendar days after an assignment for the benefit of creditors or the appointment of a receiver or trustee to take over the business of the franchisee or licensee, whether in a receivership, reorganization, bankruptcy assignment for the benefit of creditors, or other action or proceeding. However, the franchise or license may be reinstated within that 120 day period, if: (A) such assignment, receivership or trusteeship has been vacated; or (B) such assignee, receiver or trustee has fully complied with the terms and conditions of this title and the franchise or license and has executed an agreement, approved by any court having jurisdiction, assuming and agreeing to be bound by the terms and conditions of this title and the franchise or license. However, in the event of foreclosure or other judicial sale of any of the facilities, equipment or property of a franchisee or licensee, the City may revoke the franchise or license, following a public hearing before the City Council, by serving notice upon the franchisee or licensee and the successful bidder at the sale, in which event the franchise or license and all rights and privileges of the franchise or license will be revoked and will terminate 30 calendar days after serving such notice, unless: (A) the City has approved the transfer of the franchise or

license to the successful bidder; and (B) the successful bidder has covenanted and agreed with the City to assume and be bound by the terms and conditions of the franchise or license and this title.

16.01.8.6 Effect of Termination or Forfeiture. Upon termination or forfeiture of a license or franchise, whether by action of the City as provided above, or by passage of time, the franchisee or licensee shall be obligated to cease using the communications system for the purposes authorized by the franchise. The City may either take possession of some or all of the licensee's or franchisee's facilities in the public rights-of-way or require the licensee or franchisee or its bonding company to remove some or all of the licensee's or franchisee's facilities from the public rights-of-way and restore the public rights-of-way to its same, or better, condition. Should the franchisee or licensee neglect, refuse, or fail to remove such facility, the City may remove the facility at the expense of the franchisee or licensee. The obligation of the licensee or franchisee to remove shall survive the termination of the franchise or license for a period of two years; provided, that this provision does not permit the City to take possession of, or require the franchisee or licensee to remove, any facilities that are used to provide another service for which the franchisee holds a valid franchise or license issued by the City.

16.01.8.7 Remedies Cumulative. All remedies under this title and any franchise or license are cumulative unless otherwise expressly stated. The exercise of one remedy shall not foreclose use of another, nor shall the exercise of a remedy or the payment of liquidated damages or penalties relieve a communications system operator of its obligations to comply with its franchise or license. Remedies may be used singly or in combination; in addition, the City may exercise any rights it has at law or equity. Recovery by the

City of any amounts under insurance, the performance bond, the security fund or letter of credit, or otherwise, does not limit a communications system operator's duty to indemnify the City in any way; nor shall such recovery relieve a communications system operator of its obligations under a franchise or license, limit the amounts owed to the City, or in any respect prevent the City from exercising any other right or remedy it may have.

16.01.8.8 Access to Books And Records.

16.01.8.8.1 Each communications system operator shall provide the City access to all books and records related in whole or in part to the construction, operation, or repair of the communications system so that the City may inspect and copy these books and records pertaining to the franchise and other matters within the City's jurisdiction. The operators' obligation includes the obligation to produce all books and records related to revenues derived from the operation of the communications system to the extent that system revenues affect the fees charged or burdens imposed on the operator under this franchise. An operator is responsible for obtaining or maintaining the necessary possession or control of all such books and records related to the construction, operation or repair of the communications system, so that it can produce the documents upon request. Books and records must be maintained for a period of five years, except that (a) any record that is a public record must be maintained for no less than the period required by State law; and (b) a franchise may specify a shorter period for certain categories of voluminous books and records where the information contained therein can be derived simply from other materials.

16.01.8.8.2 For purposes of this title, the terms "books and records" shall be read expansively to include information in whatever format stored. Books and records requested shall

be produced to the City at the location designated by the City Manager, or by agreement or pursuant to Sections 16.01.8.8.3.

16.01.8.8.3 If any books and records are too voluminous, or for security reasons cannot be copied and moved, then a communications facility operator may request that the inspection take place at some other location mutually agreed to by the City and the operator, provided that (1) the operator must make necessary arrangements for copying documents selected by the City after its review; and (2) the operator must pay all travel and additional copying expenses incurred by the City (above those that would have been incurred had the documents been produced in the City) in inspecting those documents or having those documents inspected by its designee.

16.01.8.8.4 Without limiting the foregoing, the operator of a communications facility shall provide the City the following within 10 days of their receipt or (in the case of documents created by the operator or its Affiliate) filing:

16.01.8.8.4.1 Notices of deficiency or forfeiture related to the operation of the communications Facility; and

16.01.8.8.4.2 Copies of any request for protection under bankruptcy laws, or any judgment related to a declaration of bankruptcy by the franchisee or by any partnership or corporation that owns or controls the franchisee directly or indirectly.

16.01.8.9 Retention of records; relation to privacy rights. Each communications facility operator shall take all reasonable steps required, if any, to ensure that it is able to provide the City all information which must be provided or may be requested under this title, a franchise or license, or applicable law, including by providing appropriate subscriber privacy notices. Each operator shall be responsible for redacting any data that applicable law

prevents it from providing to the City. Nothing in this section shall be read to require an operator to violate state or federal law protecting subscriber privacy.

16.01.8.10 Reports. The City Manager may require operators of communications facilities to maintain records, and to prepare reports relevant to determining the compliance of the communications facility operator with the terms and conditions of this title and their franchises or licenses. operators shall maintain such records and provide such reports additionally as are specifically required by Chapters 16.01,16.02, 16.03, and 16.04 of this title.

16.01.8.11 Maps. Each communications facility operator shall maintain accurate maps and improvement plans which show the location, size, and a general description of all facilities installed in the public rights-of-way and any power supply sources (including voltages and connections). Maps shall be based upon post-construction inspection to verify location. The operator of each communications facility shall provide a map to the City showing the location of its facilities, in such detail and scale as may be directed by the City Engineer. New system maps shall be promptly submitted to the City when the facility expands or is relocated. Copies of maps shall be provided on disk, in a commercially available electronic format specified by the City Engineer.

16.01.8.12 Compliance with Laws. Each franchisee and licensee shall comply with all applicable laws heretofore and hereafter adopted or established during the entire term of its franchise or license.

16.01.8.13 Reservation of Authority. The City may do all things which are necessary and convenient in the exercise of its jurisdiction under this title.

16.01.8.14 No Waiver. The failure of the City to insist on timely performance or compliance by any person holding a

license or franchise shall not constitute a waiver of the City's right to later insist on timely performance or compliance by that person or any other person holding such a license or franchise.

16.01.8.15 Title Not a Contract. The City expressly reserves the right to amend this title and any franchise thereunder from time-to-time in the exercise of its lawful powers. The provisions of this title shall not be construed to create or be a contract. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.9 Transitional provisions.

16.01.9.1 Persons Operating Without a Franchise or License. The operator of any facility, the operation of which is required to be franchised or licensed under this title, other than a person holding a lease under Section 16.01.9.3, shall have three months from the effective date of this title to file one or more applications for a franchise or a license under this ordinance. Any operator or private communications system owner timely filing such an application shall not be subject to a penalty under Section 16.01.8.4 hereof for failure to have such a franchise or license as long as said application remains pending; provided, however, nothing herein shall relieve any communications system operator of any liability for its failure to obtain any franchise, permit or other authorization required under other provisions of the Tacoma Municipal Code, and nothing herein shall prevent the City from requiring removal of any facilities installed in violation of the Tacoma Municipal Code.

16.01.9.2 Persons Holding Franchises or Licenses. Any person holding an outstanding franchise or license from the City for a communications system to provide specified services or for a private communications system may continue to operate under the existing franchise or license to the conclusion of its present term (but not any renewal or

extension thereof) with respect to those activities expressly authorized by the franchise or license; provided, however, that such franchisee or licensee may elect at any time to apply for a superseding franchise or license under this title and must seek additional franchises or licenses to provide other services; and provided further that, such person shall be subject to the other provisions of this title to the extent permitted by law; provided further, that licenses that are revocable at will may be revoked by the City, and the licensee may be required to obtain a new license under this title.

16.01.9.3 Persons Holding Leases for Property in the Right-Of-Way. Any lessee under a lease from the City for an antenna site located in the right-of-way that is valid and in force on the effective date of this title may continue to occupy such antenna site to the conclusion of the term of the lease (but not any renewal or extension thereof), in accordance with the terms of such lease; provided, however, that such lessee may elect at any time to apply for a superseding lease, franchise or license under this title.

16.01.9.4 Persons with Pending Applications. Pending applications shall be subject to this title. A Person with a pending application shall be provided 30 days from the effective date of this title to submit additional information to comply with the requirements of this title governing applications.

16.01.9.5 Transitional Rules to be Narrowly Interpreted. It is the intent of the City to apply the provisions of this title to communications system operators, including local exchange carriers that now occupy or may in the future occupy public rights-of-way, except to the extent federal or state law prevents it from doing so. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.10 Special rules for government entities.

Nothing herein requires the City to apply the provisions of this title to a government entity if the City determines that it is not in the public interest to do so, and nothing in this title shall be read to require a government entity to comply with this title, where the City cannot enforce the title against such entity as a matter of law. The City is authorized to enter into agreements with other governmental agencies to facilitate the City's use and management of its rights-of-way, and such agreements shall be enforceable according to their respective terms and notwithstanding any provision of this title. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.11 No waiver.

The failure of the City to enforce any provision of this title on any occasion shall not operate as a waiver or estoppel of this right to enforce any provision of this title on any other occasion, nor shall the failure to enforce any prior ordinance or Charter provisions affecting communications facilities or Communications System operators act as a waiver or estoppel against application of this title or any other provision of applicable law. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.02

SPECIAL RULES APPLICABLE TO TELECOMMUNICATIONS FACILITIES AND TELECOMMUNICATIONS SERVICE PROVIDERS

Sections:

16.02.1 Application for a Franchise.
16.02.1.1 Contents Of Application For Initial Or Renewal Franchise
16.02.1.2 Additional information regarding affiliates; presumptions

16.02.1.3 Applications for transfer
16.02.1.4 City review

16.02.2 Compensation.
16.02.2.1 Right-of-way fee
16.02.2.2 Gross revenues defined
16.02.2.3 Public record

16.02.3 Additional franchise requirements.
16.02.3.1 Reservation of authority
16.02.3.2 Provision of facilities and equipment
16.02.3.3 Annual reports

16.02.1 Application for a Franchise.

16.02.1.1 Contents Of Application For Initial Or Renewal Franchise. In order to obtain an initial or renewal franchise, an operator of a telecommunications facility must apply for a franchise. The application must contain the following information, and such information as the City may from time to time require.

16.02.1.1.1 Identity of the applicant; the persons who exercise working control over the applicant; and the persons who control those persons, to the ultimate parent.

16.02.1.1.2 A proposal for construction of a telecommunications facility, that includes at least the following:

16.02.1.1.2.1 a description of the services that are to be provided using the facility.

16.02.1.1.2.2 the location of proposed facility and facility design, including a description of the miles of plant to be installed, and a description of the size of equipment cabinets, shielding and electronics that will be installed along the plant route, the power sources that will be used and a description of the noise, exhaust and pollutants, if

any, that will be generated by the operation of the same; provided, however, that, if some of the descriptive data is not available at the time of application, the franchise may be issued subject to conditions that the data be filed and approved by the City before construction begins and that the franchise will be deemed to be forfeited if the data is not supplied and approved; provided, further, that the foregoing proviso does not authorize the grant of a franchise where there is not sufficient information to appraise the impact of the applicant's proposal; provided further, in the event that Sections 16.02.1.1.2.2-.3 require information that is a business or trade secret and/or proprietary information and the operation wishes to protect the information against disclosure, then operator shall provide said information to City in a separate envelope marked "Proprietary Information: DO NOT DISCLOSE." The City will exercise good faith efforts to protect the confidentiality of the business or trade secrets or proprietary information that is designated as such; provided further, that (A) in the event a public disclosure request is made for information marked as proprietary, and if the City Attorney determines that said information may be subject to being disclosed; or (B) the City determines that the information should be disclosed in connection with its enforcement of any provision of this title, or in the exercise of its police or regulatory powers; then the City shall notify the operator of the operator's opportunity to seek a protective order from a court with appropriate jurisdiction. In the event that a protective order is not obtained within 30 days or, if shorter, the time limitation set forth in State law, then City may disclose said information. The operator is obligated to reimburse and indemnify City for all costs, damages and attorney fees that may be awarded or assessed by the court for any actions the City took at the request of operator.

16.02.1.1.2.3 A map of the general route the facility will follow; a designation of the portions of the system that will be placed above ground and the portions that will be placed underground, and the construction techniques that the operator proposes to use in installing the system above ground and underground; a schedule for construction of the facility, describing when and where construction will begin, how it will proceed, and when it will be completed; and the expected effect on right-of-way usage, including information on the ability of the public rights-of-way to accommodate the proposed system, including, as appropriate given the system proposed, an estimate of the availability of space in conduits and an estimate of the cost of any necessary rearrangement of existing facilities; provided, however, that any proprietary information required under this subparagraph as well as the preceding subparagraph shall be subject to the non-disclosure procedure prescribed in the proviso of the preceding subparagraph.

16.02.1.1.2.4 A description, where appropriate, of how services will be converted from existing facilities to new facilities, and what will be done with existing facilities.

16.02.1.1.2.5 Identification of the area of the City to be served by the proposed system, including a description of the proposed franchise area's boundaries.

16.02.1.1.3 Evidence satisfactory to the City that the applicant has the financial resources to complete the proposed project, and to construct, operate and repair the proposed facility over the franchise term. It is not the intent of the City to require an applicant to prove that the services it proposed to offer will succeed in the marketplace.

16.02.1.1.4 Evidence satisfactory to the City that the applicant is technically qualified to construct, operate and repair the proposed facility. At a minimum, the applicant

must show that it has experience or resources to ensure that work is to be performed adequately, and can respond to emergencies during and after construction is complete.

16.02.1.1.5 Evidence satisfactory to the City that the applicant is legally qualified, which proof must include a demonstration that the applicant:

16.02.1.1.5.1 Has received, or is in a position to receive, necessary authorizations from State and Federal authorities;

16.02.1.1.5.2 Has not engaged in conduct (fraud, racketeering, violation of antitrust laws, consumer protection laws, or similar laws) that allows City to conclude the applicant cannot be relied upon to comply with requirements of franchise, or provisions of this title; and

16.02.1.1.5.3 Is willing to accept a franchise, to pay required compensation and to abide by the provisions of applicable law, including those relating to the construction, operation or maintenance of its facilities; and has not entered into any agreement that would prevent it from doing so;

16.02.1.1.6 An affidavit or declaration of the applicant or authorized officer thereof certifying the truth and accuracy of the information in the application, and certifying that the application meets all requirements of applicable law.

16.02.1.1.7 An applicant may show that it would be inappropriate to deny it a franchise under Section 16.02.1.1.5.2, by virtue of: the particular circumstances surrounding the acts or omissions at issue; the steps taken by the applicant to cure all harms flowing therefrom and to prevent their recurrence; and the lack of involvement of the applicant's principals, or the remoteness of the acts or omissions from the operation of telecommunications facilities.

16.02.1.1.8 Additional information regarding Affiliates. To the extent that the applicant is in any respect relying on the financial or technical resources of another person, including another affiliate, the proofs required by Sections 16.02.1.1.3-16.02.1.1.5 should be provided for that person.

16.02.1.2 Presumptions. An applicant will be presumed to have the requisite financial, technical, or legal qualifications if its application shows that such qualifications have been reviewed and approved by the Washington Utilities and Transportation Commission; or, if applicant is a holder of a franchise in the City for a cable system or open video system, provided that, notwithstanding this presumption, the City may require the applicant to provide and may consider information regarding applicant's financial, technical, or legal qualifications as the City determines necessary to protect the public interest. An applicant that is leasing existing facilities from a franchised communications facility operator, where the applicant will have no responsibility for any activity that involves work in the public rights-of-way, may rely upon the franchisee's technical qualifications, and will be presumed to have the necessary financial qualifications.

16.02.1.3 Applications For Transfer. An application for a transfer of a franchise must contain the same information required by Section 16.02.1.1, except that, if the transferor submitted an application under Section 16.02.1.1, to the extent information provided by the transferor under Section 16.02.1.1.2 remains accurate, the transferee may simply cross-reference the earlier application.

16.02.1.4 City Review. The City may request such additional information as it finds necessary, and require such modifications to the system proposed as may be necessary in the exercise of the City's authority over telecommunications systems. Once the information required by the City has been provided, the application

shall be subject to review by the City and any approval shall be subject to the City's determination that:

16.02.1.4.1 The applicant has the qualifications to construct, operate and repair the system proposed in conformity with applicable law.

16.02.1.4.2 The applicant will accept the modifications required by the City to its proposed system. This section does not authorize the City to exercise authority it does not otherwise have under applicable law.

16.02.1.4.3 The applicant will enter into a franchise and comply with any conditions precedent to its effectiveness.

16.02.1.4.4 In the case of a transfer, any approval will also be subject to a determination that:

16.02.1.4.4.1 There will be no adverse effect on the public interest, or the City's interest in the franchise;

16.02.1.4.4.2 Transferee will agree to be bound by all the conditions of the franchise and to assume all the obligations of its predecessor; and

16.02.1.4.4.3 Any outstanding compliance and compensation issues will be resolved or preserved to the satisfaction of the City.

16.02.1.4.5 An applicant shall not be issued a franchise if it files or in the previous three years filed materially inaccurate or misleading information in a franchise application or intentionally withheld information that the applicant lawfully is required to provide. An application for a franchise area may be denied if the franchisee has no plans for constructing a system within the entire area for which the franchise is sought.

16.02.2 Compensation.

16.02.2.1 Rights-of-Way Fee. Subject only to the exceptions set out in Sections 16.01.4.3, 16.01.5.2, and 16.01.5.5 of this

title, every operator of a telecommunications facility must pay compensation to the City equal to 6 percent of gross revenues, or such other amount as may be provided in a franchise.

16.02.2.2 Gross Revenues Defined. Gross Revenues, for purposes of this Chapter 16.02, includes all revenue derived directly or indirectly by the operator; or derived directly or indirectly by their affiliates, subsidiaries, parent companies, and any person in whom the operator has a financial interest, or revenues received by the operator from a person with whom operator has a revenue-producing agreement, from the provision of telecommunications services via the telecommunications system, which provision shall be interpreted to include all services and ancillary equipment; provided, however, that this term shall not include taxes imposed directly upon any subscriber or user by the Federal, State, county, or other governmental unit and required to be collected by the operator; provided further, that a franchisee may deduct from its gross revenues those revenues received from a lessee that holds a franchise or license under this title, if that lessee submits a certificate to the telecommunications operator stating that it has paid the fees it owes the City for the applicable reporting period. Copies of the certificate must be provided to the City.

16.02.2.3 Public Record. The compensation paid by each provider for use of public rights-of-way shall be a matter of public record and available for public inspection. (Ord. 26053 § 1; passed April 15, 1997.)

16.02.3 Additional Franchise requirements.

16.02.3.1 Reservation of Authority. In addition to satisfying the requirement of Chapter 16.01, every franchise shall specifically reserve the right to require a franchisee to construct facilities or to make payments that may be required to comply with any universal service plan the City may lawfully adopt; and to comply with any lawful

requirements to ensure continued quality of telecommunications services, safeguard the right of consumers, or otherwise protect the public safety and welfare.

16.02.3.2 Provision of Facilities and Equipment. The City may accept or require an operator of a telecommunications system to provide facilities or equipment for use by the City, the schools or any other governmental entity in the City as a condition of the license grant, except as prohibited by law; or may require license holders to share in the costs associated with provisions of such facilities and by other communications system operators.

16.02.3.3 Annual Reports. No later than 90 days after the end of its fiscal year, all operators shall submit a written report that shall contain such information as may be required from time to time by the City, and at least the following, unless the City waives the requirement:

16.02.3.3.1 A summary of the previous year's activities in the development of the system, including descriptions of services begun or discontinued, the number of subscribers gained or lost for each category of service;

16.02.3.3.2 A certified revenue report by the operator's Chief Financial Officer from the previous calendar year for the system.

16.02.3.3.3 An ownership report, indicating all persons who at the time of filing control or own an interest in the operator of 10 percent or more;

16.02.3.3.4 A list of officers and members of the Board of Directors of the franchisee and any affiliates directly involved in the operation or the maintenance of the system;

16.02.3.3.5 A complete report on its plant. This plant report shall state the physical miles of plant construction and plant in operation during the prior calendar year categorized as

aerial and underground, identify any cases where subscribers contributed to plant extension, provide revisions to the cable system maps filed with the City, and report the results of appropriate electronic measurements to show conformity with any FCC technical standards.

16.02.3.3.6 Once the information required by Sections 16.02.3.3.1-16.02.3.3.5 has been filed, it need be refiled only if it changes. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.03

SPECIAL RULES APPLICABLE TO OPEN VIDEO SYSTEMS

Sections:

16.03.1 Application for a Franchise.
- 16.03.1.1 Contents of application for initial or renewal franchise
- 16.03.1.2 Additional information regarding affiliates; presumptions
- 16.03.1.3 Applications for transfer
- 16.03.1.4 City review

16.03.2 Compensation.

16.03.3 Annual reports.

16.03.1 Application for a Franchise.

16.03.1.1 Contents of application for initial or renewal franchise. In order to obtain an initial or renewal franchise, an operator of an open video system must apply for a franchise. The application must contain the following information, and such information as the City may from time to time require.

16.03.1.1.1 Identity of the applicant; the persons who exercise working control over the applicant; and the persons who control those persons, to the ultimate parent.

16.03.1.1.2 A proposal for construction of the open video system that includes at least the following:

16.03.1.1.2.1 A description of the services that are to be provided over the facility.

16.03.1.1.2.2 Identification of the area of the City to be served by the proposed system, including a description of the proposed franchise area's boundaries.

16.03.1.1.2.3 The location of proposed facility and facility design, including a description of the miles of plant to be installed, and a description of the size of equipment cabinets, shielding and electronics that will be installed along the plant route, the power sources that will be used and a description of the noise, exhaust and pollutants, if any, that will be generated by the operation of the same.

16.03.1.1.2.4 A map of the route the facility will follow; a designation of the portions of the system that will be placed aboveground and the portions that will be placed underground, and the construction techniques that the operator proposes to use in installing the system aboveground and underground; a schedule for construction of the facility, describing when and where construction will begin, how it will proceed, and when it will be completed; and the expected effect on right-of-way usage, including information on the ability of the public rights-of-way to accommodate the proposed system, including, as appropriate given the system proposed, an estimate of the availability of space in conduits and an estimate of the cost of any necessary rearrangement of existing facilities.

16.03.1.1.3 A description, where appropriate, of how services will be converted from existing facilities to new facilities, and what will be done with existing facilities.

16.03.1.1.4 Evidence satisfactory to the City that the applicant has the financial resources to complete the proposed project, and to construct, operate and repair the proposed facility over the franchise term. It is not the intent of the City to require an applicant to prove that the services it proposed to offer will succeed in the marketplace.

16.03.1.1.5 Evidence satisfactory to the City that applicant is technically qualified to construct, operate and repair the proposed facility. At a minimum, the applicant must show that it has experience or resources to ensure that work is to be performed adequately, and can respond to emergencies during and after construction is complete.

16.03.1.1.6 Evidence satisfactory to the City that the applicant is legally qualified, which proof must include a demonstration that the applicant:

16.03.1.1.6.1 Has received, or is in a position to receive, necessary authorizations from state and federal authorities;

16.03.1.1.6.2 Has not engaged in conduct (fraud, racketeering, violation of antitrust laws, consumer protection laws, or similar laws) that allows City to conclude the applicant cannot be relied upon to comply with requirements of franchise, or provisions of this title;

16.03.1.1.6.3 Is willing to enter into a franchise, to pay required compensation and to abide by the provisions of applicable law, including those relating to the construction, operation or maintenance of its facilities, and has not entered into any agreement that would prevent it from doing so;

16.03.1.1.7 An affidavit or declaration of the applicant or authorized officer thereof certifying the truth and accuracy of the information in the application, and certifying that the application meets all requirements of applicable law.

16.03.1.1.8 An applicant may show that it would be inappropriate to deny it a franchise under Section 16.03.1.1.6.2, by virtue of: the particular circumstances surrounding the acts or omissions at issue; the steps taken by the applicant to cure all harms flowing therefrom and to prevent their recurrence; and the lack of involvement of the applicant's principals, or the remoteness of the acts or omissions from the operation of open video system facilities.

16.03.1.2 Additional Information Regarding Affiliates; Presumptions. To the extent that the applicant is in any respect relying on the financial or technical resources of another person, including another Affiliate, the proofs required by Sections 16.03.1.1.3-16.03.1.1.5 should be provided for that person. An applicant will be presumed to have the requisite financial, or technical or legal qualifications to the extent such qualifications have been reviewed and approved by a state agency of competent jurisdiction; or if applicant is a holder of a franchise in the City for a cable system or open video system, and conduct under such other franchise provides no basis for additional investigation.

16.03.1.3 Applications For Transfer. An application for a transfer of a franchise must contain the same information required by Section 16.03.1.1, except that, if the transferor submitted an application under Section 16.03.1.1, to the extent information provided by the transferor under Section 16.03.1.1.2 remains accurate, the transferee may simply cross-reference the earlier application.

16.03.1.4 City Review. The City may request such additional information as it finds necessary, and require such modifications to the application as may be necessary in the exercise of the City's authority over open video systems. Once the information required by the City has been provided, the application shall be subject to review by

the City and any approval will also be subject to a City determination that:

16.03.1.4.1 The applicant has the qualifications to construct, operate and repair the system proposed in conformity with applicable law.

16.03.1.4.2 The applicant will accept the modifications required by the City to its proposed system. This section shall not be read to authorize the City to exercise authority it does not otherwise have under applicable law.

16.03.1.4.3 The applicant will enter into a franchise and comply with any conditions precedent to its effectiveness.

16.03.1.4.4 In the case of a transfer, the approval is also subject to a determination that:

16.03.1.4.4.1 There will be no adverse effect on the public interest, or the City's interest in the franchise;

16.03.1.4.4.2 Transferee will agree to be bound by all the conditions of the franchise and to assume all the obligations of its predecessor; and

16.03.1.4.4.3 Any outstanding compliance and compensation issues will be resolved or preserved to the satisfaction of the City.

16.03.1.4.5 An applicant shall not be issued a franchise if it files or in the previous three years filed materially inaccurate or misleading information in a franchise application or intentionally withheld information that the applicant lawfully is required to provide. (Ord. 26053 § 1; passed April 15, 1997.)

16.03.2 Compensation.

Every operator of an open video system shall pay compensation to the City as follows:

16.03.2.1 To the extent that the system is used to provide cable services: a percentage of gross revenues each month

equal to the gross revenue percentage paid by any cable operator for the same month; provided, however, that, if there is no cable system operating, the percentage shall be equal to the percentage fee that would have been levied on a cable operator under Chapter 16.04, subject to any limit imposed by federal law. Gross Revenues shall be defined to include all the gross revenues derived from the operation of an open video system to provide cable services, and, except as federal law requires otherwise, shall include the gross revenues of affiliated persons using the capacity of the open video system to provide cable service to subscribers for a fee, less amounts paid to the open video system operator to the extent the operator pays a fee on such revenues. In addition, unless a franchise provides otherwise, an open video system operator (1) shall pay to the City, at a time directed by the City, an amount equal to the highest amount contributed by any entity operating a cable system for and in support of public, educational, and government use (including institutional network use) of its cable system; and (2) to the extent that such entity is providing other support for public, educational or governmental use, the operator must duplicate that support within a time and in a manner directed by the City, or provide a cash equivalent acceptable to the City; or (3) if there is no such entity, the highest amount permitted under applicable law. In applying this section, the City may take such steps as it deems appropriate to ensure that the obligations borne by the open video system operator are no greater or lesser than the obligation imposed upon the cable operator providing the greatest benefits to the community. Further, the City reserves the right, and every franchise shall be interpreted to incorporate the right, to require the operator to pay additional compensation if the provisions of federal law specifying the compensation to be paid by operators changes or is declared invalid, or to ensure that

the operator of an open video system pays no less than the amount paid by any cable operator.

16.03.2.2 To the extent that the open video system is used for the provision of telecommunications services, the open video system operator shall pay the fee required by Chapter 16.02. (Ord. 26053 § 1; passed April 15, 1997.)

16.03.3 Annual reports.

No later than 90 days after the end of its fiscal year, a cable operator shall submit a written report that shall contain such information as may be required from time to time by the City, and at least the following, unless the City waives the requirement:

16.03.3.1 A summary of the previous year's activities in the development of the open video system, including descriptions of services begun or discontinued, the number of subscribers gained or lost for each category of cable service;

16.03.3.2 A revenue report from the previous calendar year for the open video system, certified by the operator's chief financial officer.

16.03.3.3 An ownership report, indicating all persons who at the time of filing control or own an interest in the open video system operator of 10 percent or more;

16.03.3.4 A list of officers and members of the Board of Directors of the franchisee and any affiliates directly involved in the operation or the maintenance of the open video system;

16.03.3.5 An annual report of each entity identified in Section 16.03.3.5 which issues an annual report;

16.03.3.6 A complete report on its plant. This plant report shall state the physical miles of plant construction and plant in operation during the prior calendar year categorized as

aerial and underground, identify any cases where subscribers contributed to plant extension, provide revisions to the open video system maps filed with the City, and report the results of appropriate electronic measurements to show conformity with FCC technical standards.

16.03.3.7 Once the information required by Sections 16.03.3.1-16.03.3.6 has been filed, it need be refiled only if it changes. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.04

SPECIAL RULES APPLICABLE TO CABLE TELEVISION SYSTEMS

Sections:

16.04.1 Additional definitions.
- 16.04.1.1 Access channel
- 16.04.1.2 Basic cable service or basic service
- 16.04.1.3 Cable act
- 16.04.1.4 Cable operator
- 16.04.1.5 Educational access or educational use
- 16.04.1.6 Equitable price
- 16.04.1.7 Fair market value
- 16.04.1.8 Governmental access channel
- 16.04.1.9 Gross revenues
- 16.04.1.10 Non-cable service
- 16.04.1.11 Public access channel
- 16.04.1.12 Service tier
- 16.04.1.13 Subscriber
- 16.04.1.14 User

16.04.2 No exclusivity.

16.04.3 Relation to 47 U.S.C. §§ 545-546.

16.04.4 Applications for grant, renewal, or modification.
- 16.04.4.1 Written application
- 16.04.4.2 Contents of applications
- 16.04.4.3 Procedure for applying for grant of a franchise, other than an application that is subject to 47 U.S.C. §546
- 16.04.4.4 Procedure for applying for grant of a Cable Act renewal franchise
- 16.04.4.5 Informal applications for renewal
- 16.04.4.6 Application for modification of a franchise
- 16.04.4.7 Public hearings

16.04.5 Construction provisions.
- 16.04.5.1 System construction schedule
- 16.04.5.2 Use of cable operator's facilities
- 16.04.5.3 Provision of service/quality of service
- 16.04.5.4 System maintenance
- 16.04.5.5 Continuity of service

16.04.6 Operation and reporting provisions.
- 16.04.6.1 Communication with regulatory agencies
- 16.04.6.2 Reports
- 16.04.6.3 Records required

16.04.7 Rate regulation and consumer protection.
- 16.04.7.1 Scope and applicability
- 16.04.7.2 Rate regulation procedures
- 16.04.7.3 Rate discrimination prohibited
- 16.04.7.4 Redlining prohibited
- 16.04.7.5 Cable customer service standards

16.04.8 Franchise fee.
- 16.04.8.1 Amount of franchise fee

16.04.9 Transfers.
16.04.9.1 City approval required
16.04.9.2 Application
16.04.9.3 Determination by City
16.04.9.4 Transferee's agreement
16.04.9.5 Approval does not constitute waiver
16.04.9.6 Exception for intra-company transfers

16.04.10 Connections to cable systems; use of antennae.
16.04.10.1 Subscriber right to attach
16.04.10.2 Removal of existing antennae

16.04.1 Additional definitions.

The following definitions are in addition to those in Chapter 16.01.

16.04.1.1 "Access channel" means any capacity on a cable system set aside by a franchise for public, educational, or governmental use.

16.04.1.2 "Basic cable service" or "basic service" means any service tier that includes the retransmission of local television broadcast signals.

16.04.1.3 "Cable Act" means the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq., as amended by the Cable Television Consumer Protection and Competition Act of 1992, as further amended by the Telecommunications Act of 1996, as further amended from time to time.

16.04.1.4 "Cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more Affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

16.04.1.5 "Educational access or educational use" means any capacity on a cable system set aside by a franchise for use by accredited educational institutions.

16.04.1.6 "Equitable Price" means fair market value adjusted downward for the harm to the City or subscribers, if any, resulting from a franchisee's breach of its franchise or violation of this title and as further adjusted to account for other equitable factors that may be considered consistent with 47 U.S.C. § 547.

16.04.1.7 "Fair market value" means the price for the cable system valued as a going concern but with no value allocated to the franchise itself.

16.04.1.8 Governmental access channel means any capacity on a cable system set aside by a franchisee for government use.

16.04.1.9 "Gross revenues" refers to gross revenues of any cable operator of a cable system in any way derived from the operation of that cable system to provide cable services in the franchise area. Gross revenues include, by way of illustration and not limitation, monthly fees charged subscribers for any basic, optional, premium, per-channel, or per-program service; installation, disconnection, reconnection, and change-in-service fees; leased channel fees; late fees and administrative fees; revenues received from programmers for carriage of programming on the cable system; revenues from rentals or sales of converters or other equipment; advertising revenues; revenues from program guides; and revenues from home shopping channels. This provision shall be read broadly to prevent the avoidance of franchise fees by a cable operator through arrangements with affiliates. Gross revenues shall not include any taxes on services furnished by a franchisee which are imposed directly on any subscriber or user by the State, City, or other governmental unit and which are

collected by a franchisee on behalf of said governmental unit.

16.04.1.10 "Non-cable service" means any service that is authorized to be distributed over the cable system, other than a cable service.

16.04.1.11 "Public access channel" means any capacity on a cable system set aside by a franchisee for use by the general public, including groups and individuals, and which is available for such use on a legally non-discriminatory basis.

16.04.1.12 "Service tier" means a package of two or more cable services for which a separate charge is made by the franchisee, other than a package of premium and pay-per-view services that is not subject to rate regulation under the Cable Act and applicable FCC regulations because those services are also sold on a true à la carte basis.

16.04.1.13 "Subscriber" means the City, any government entity or any person who legally receives any cable service from a cable operator delivered over that cable operator's cable system.

16.04.1.14 "User" means a person or the City utilizing a channel, capacity or equipment and facilities for purposes of producing or transmitting material, as contrasted with the receipt thereof in the capacity of a subscriber. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.2 No exclusivity.

A franchisee may not require a subscriber or a building owner or manager to enter into an exclusive contract as a condition of providing or continuing service. However, nothing herein prevents a franchisee from entering into an otherwise lawful, mutually desired exclusive arrangement with a building owner or manager of a multiple dwelling unit or commercial subscriber. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.3 Relation to 47 U.S.C. §§ 545-546.

This Chapter 16.04 shall be read and applied so that it is consistent with the Sections 625 and 626 of the Cable Act, 47 U.S.C. §§ 545-546 to the extent the City is required to comply with those Cable Act sections; provided, however, that nothing herein shall be read to incorporate those provisions into the City Code, or prevent the City from challenging their applicability or to give any entity a right or a right of action or impose any obligation on the City which it would not otherwise have under such federal laws. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.4 Applications for grant, renewal or modification of Franchise.

16.04.4.1 Written Application.

16.04.4.1.1 A written application shall be filed with the City for (1) grant of an initial franchise; (2) renewal of a franchise within the meaning of 47 U.S.C. § 546(a)-(g); or (3) modification of a franchise pursuant to this title or a franchise. A request for renewal, pursuant to 47 U.S.C. § 546(h), may also be filed informally, as provided in Section 16.04.4.5.

16.04.4.2 Contents of Applications. Except as expressly required by the City for good cause a request for proposals for a cable franchise shall be deemed to require, and any application submitted pursuant to this Section 16.04.4.1 (and expressly not an informal renewal application submitted within the meaning of 47 U.S.C. § 546(h)) shall contain, at a minimum, the following information:

16.04.4.2.1 Identity of the applicant; the persons who exercise working control over the applicant; and the persons who control those persons, to the ultimate parent.

16.04.4.2.2 Identification of the area of the City to be served by the proposed cable system, including a description of the proposed franchise area's boundaries.

16.04.4.2.3 A detailed description of the physical facilities proposed, which shall include at least the following:

16.04.4.2.3.1 A description of the channel capacity, technical design, performance characteristics, headend, access (and institutional network) facilities and equipment;

16.04.4.2.3.2 The location of proposed facility and facility design, including a description of the miles of plant to be installed, and a description of the size of equipment cabinets, shielding and electronics that will be installed along the plant route, the power sources that will be used and a description of the noise, exhaust and pollutants, if any, that will be generated by the operation of the same; provided, however, that, if some of the descriptive data is not available at the time of application, the franchise may issue subject to conditions that the data be filed and approved by the City before construction begins and that the franchise will be deemed to be forfeited if the data is not supplied and approved; provided, further, that the foregoing proviso does not authorize the grant of a franchise where there is not sufficient information to appraise the impact of the applicant's proposal; provided further, in the event that Sections 16.04.4.2.3.2-16.04.4.2.3.3 requires information that is a business or trade secret and/or proprietary information and the operation wishes to protect the information against disclosure, then operator shall provide said information to City in a separate envelope marked "Proprietary Information: DO NOT DISCLOSE." The City will exercise good faith efforts to protect the confidentiality of the business or trade secrets or proprietary information that is designated as such; provided further, that (A) in the event a public disclosure request is made for information marked as proprietary, and if the City Attorney determines that said information may be subject to being disclosed; or (B) the City determines that the information should be disclosed in connection with its

enforcement of any provision of this title, or in the exercise of its police or regulatory powers; then the City shall notify the operator of the operator's opportunity to seek a protective order from a court with appropriate jurisdiction. In the event that a protective order is not obtained within 30 days or, if shorter, the time limitation set forth in State law, then City may disclose said information. The operator is obligated to reimburse and indemnify City for all costs, damages and attorney fees that may be awarded or assessed by the court for any actions City took at the request of operator.

16.04.4.2.3.3 A map of the general route the facility will follow; a designation of the portions of the system that will be placed above ground and the portions that will be placed underground, and the construction techniques that the operator proposes to use in installing the system above ground and underground; a schedule for construction of the facility, describing when and where construction will begin, how it will proceed, and when it will be completed; and the expected effect on right-of-way usage, including information on the ability of the public rights-of-way to accommodate the proposed system, including, as appropriate given the system proposed, an estimate of the availability of space in conduits and an estimate of the cost of any necessary rearrangement of existing facilities; provided, however, that any proprietary information required under this subparagraph as well as the preceding subparagraph shall be subject to the non-disclosure procedure prescribed in the proviso of the preceding subparagraph.

16.04.4.2.3.4 A description, where appropriate, of how services will be converted from existing facilities to new facilities, and what will be done with existing facilities.

16.04.4.2.4 A demonstration of how the applicant will reasonably meet the future cable-related needs and interests

of the community, including descriptions of the capacity, facilities and support for public, educational, and governmental use of the cable system (including institutional networks) applicant proposes to provide and why applicant believes that the proposal is adequate to meet the future cable-related needs and interests of the community.

16.04.4.2.5 A demonstration of the financial qualifications of the applicant, including at least the following:

16.04.4.2.5.1 The proposed rate structure, including projected charges for each service tier, installation, converters, and all other proposed equipment or services;

16.04.4.2.5.2 a statement regarding the applicant's financial ability to complete the construction to meet the time frame proposed and to operate the cable system proposed certified by the applicant's chief financial officer; and

16.04.4.2.5.3 Pro forma financial projections for the proposed franchise term, including a statement of projected income, and a schedule of planned capital additions, with all significant assumptions explained in notes or supporting schedules.

16.04.4.2.6 A demonstration of the applicant's technical ability to construct and/or operate the proposed cable system;

16.04.4.2.7 A demonstration that the applicant is legally qualified, which proof must include a demonstration that the applicant:

16.04.4.2.7.1 Has received, or is in a position to receive, necessary authorizations from State and Federal authorities;

16.04.4.2.7.2 Has not engaged in conduct (fraud, racketeering, violation of antitrust laws, consumer protection laws, or similar laws) that allows City to

conclude the applicant cannot be relied upon to comply with requirements of franchise, or provisions of this title;

16.04.4.2.7.3 Is willing to enter into a franchise, to pay required compensation and to abide by the provisions of applicable law, including those relating to the construction, operation or repair of its facilities; and has not entered into any agreement that would prevent it from doing so; and

16.04.4.2.7.4 The applicant must not have submitted an application for an initial or renewal franchise to the City, which was denied on the ground that the applicant failed to propose a cable system meeting the cable-related needs and interests of the community, or as to which any challenges to such franchising decision were finally resolved (including any appeals) adversely to the applicant, within three years preceding the submission of the application.

An applicant may show that it would be inappropriate to deny it a franchise under Section 16.04.4.2.7.2, by virtue of: the particular circumstances surrounding the acts or omissions at issue; the steps taken by the applicant to cure all harms flowing therefrom and to prevent their recurrence; and the lack of involvement of the applicant's principals, or the remoteness of the acts or omissions from the operation of communications systems.

16.04.4.2.8 The extent that the applicant is in any respect relying on the financial or technical resources of another person, including another affiliate, the proofs required Section 16.04.4.2.5 - Section 16.04.4.2.6 should be provided for that person.

16.04.4.2.9 A description of the applicant's prior experience in cable system ownership, construction, and operation, and identification of cities and counties in Washington in which the applicant or any of its principals have a cable franchise or any interest therein, provided that an applicant that holds a franchise for the City and is seeking renewal of

that franchise need only provide this information for other cities and counties in Washington where its franchise is scheduled to expire during the 12-month period prior to the date its application is submitted to the City and for other cities and counties in Washington where its franchise had been scheduled to expire during the 12-month period after the date its application is submitted to the City. If an applicant has no other franchise in Washington, it shall provide the information for its operations in other states.

16.04.4.2.10 An affidavit or declaration of the applicant or authorized officer thereof certifying the truth and accuracy of the information in the application, and certifying that the application meets all requirements of applicable law.

16.04.4.3 Procedure for applying for grant of a franchise, other than an application that is subject to 47 U.S.C. §546.

16.04.4.3.1 A person may apply for a franchise in response to a request for proposals ("RFP") issued by the City. Any response to an RFP shall contain the information required by Section 16.04.4.2, and such other information as the RFP may require, and must be submitted in accordance with the requirements in the RFP. A properly filed response to an RFP is subject to evaluation in accordance with Section 16.04.4.3.3. The City may conduct such investigations from time to time as may be appropriate to establish RFP requirements.

16.04.4.3.2 Notwithstanding the provisions of Section 16.04.4.3.1, a person may apply for an initial franchise by submitting an unsolicited application containing the information required in Section 16.04.4.2 and requesting an evaluation of that application pursuant to Section 16.04.4.3.3. Prior to evaluating that application, the City may conduct such investigations as are necessary to determine whether the application satisfies the standards set forth in Section 16.04.4.3.3, including by commencing a

proceeding to identify the future cable-related needs and interests of the community. It also may seek additional applications prior to evaluating the application. An applicant for an initial franchise shall be provided an opportunity to amend its application in light of the result of any investigation conducted by the City, prior to evaluation of that application pursuant to Section 16.04.4.3.3.

16.04.4.3.3 In evaluating an application for a franchise, the City may consider the following factors:

16.04.4.3.3.1 The extent to which the applicant has substantially complied with the applicable law and the material terms of any existing cable franchise for the City;

16.04.4.3.3.2 Whether the quality of the applicant's service under any existing franchise in the City, including signal quality, response to customer complaints, billing practices and the like has been reasonable in light of the needs and interests of the communities served;

16.04.4.3.3.3 Whether the applicant has the financial, technical, and legal qualifications to hold a cable franchise;

16.04.4.3.3.4 Whether the application satisfies requirements established by the City under this title or in an RFP or is otherwise reasonable to meet the future cable-related needs and interests of the community, taking into account the cost of meeting such needs and interests;

16.04.4.3.3.5 Whether, to the extent not considered as part of Section 16.04.3.3.4, the applicant will provide adequate public, educational, and governmental use capacity, facilities, or financial support thereof;

16.04.4.3.3.6 Whether issuance of a franchise is in the public interest considering the immediate and future effect on the public rights-of-way and private property that would be used by the cable system, including the extent to which installation or maintenance as planned would require

replacement of property or involve disruption of property, public services, or use of the public rights-of-way; and the comparative superiority or inferiority of competing applications; and

16.04.4.3.3.7 Whether the approval of the application may eliminate or reduce competition in the delivery of cable service in the City.

16.04.4.3.4 If the City finds that it is in the public interest to issue a franchise considering the factors set forth above, the City may adopt a franchise ordinance setting forth the terms and conditions of the franchise, which franchise shall become effective upon satisfaction of conditions precedent to effectiveness, and when signed and accepted by the applicant. If the City denies a franchise, it will cause a written explanation of the denial to issue, which may be in any appropriate form. Without limiting its authority to deny an application for a franchise, the City specifically reserves the rights to reject any application that is incomplete or fails to respond to an RFP. Nothing in this title shall be construed in any way to limit the discretion and legislative authority of the City Council in making decisions relative to the granting, denial, or renewal of a franchise.

16.04.4.4 Procedure for applying for grant of a Cable Act renewal franchise.

16.04.4.4.1 To the extent required by Federal law, requests for cable franchise renewal under the Cable Act will be received and reviewed in a manner consistent with Section 626 of the Cable Act, 47 U.S.C. § 546. It is the proposal submitted by a franchisee under 47 U.S.C. § 546(b), and not the request for commencement of the renewal proceedings submitted under 47 U.S.C. §546(a), that must contain the information required under Section 16.04.4.2.

16.04.4.4.2 If neither a franchisee nor the City activates in a timely manner, or can activate the renewal process set forth in 47 U.S.C. § 546(a)-(g) (including, for example, if the provisions are repealed), and except as to applications submitted pursuant to 47 U.S.C. § 546(h), the provisions of Section 16.04.4.3 shall apply and a renewal request shall be evaluated using the same criteria as any other request for a franchise.

16.04.4.4.3 The City may by resolution adopt procedures for conducting any proceedings required under federal law, including without limitation, procedures for presentation of evidence; and may also by resolution specify the person or entity that will conduct any administrative hearing that may be required by federal law, should the City Council decide that it does not wish to conduct the proceeding itself. In any case, however, the final decision to deny or grant renewal shall remain with the City Council.

16.04.4.5 Informal applications for renewal. Notwithstanding the above, a cable operator may submit a proposal for renewal of a franchise pursuant to 47 U.S.C. § 546(h). Such a proposal may be submitted at any time and the City may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time (including after proceedings have been commenced in accordance with 47 U.S.C. § 546(a)). An application may be denied for any reason.

16.04.4.6 Application for modification of a franchise.

16.04.4.6.1 An application for modification of a franchise shall include, at minimum, the following information:

16.04.4.6.1.1 The specific modification requested;

16.04.4.6.1.2 The justification for the requested modification, including the impact of the requested modification on subscribers and others, and the financial impact on the applicant if the modification is approved or

disapproved, demonstrated through, inter alia, submission of pro forma financial statements.

16.04.4.6.1.3 A statement indicating whether the modification is sought pursuant to Section 625 of the Cable Act, 47 U.S.C. § 545, and, if so, a demonstration that the requested modification meets the standards set forth in 47 U.S.C. § 545;

16.04.4.6.1.4 Any other information that the applicant believes is necessary for the City to make an informed determination on the application for modification; and

16.04.4.6.1.5 An affidavit or declaration of the applicant or applicant's authorized officer certifying the truth and accuracy of the information in the application, and certifying that the application is consistent with the requirements of applicable law.

16.04.4.6.2 A request for modification submitted pursuant to 47 U.S.C. § 545 shall be considered in accordance with the requirements of that section.

16.04.4.7 Public hearings. An applicant shall be notified of any public hearings held in connection with the evaluation of its application and shall be given a reasonable opportunity to be heard. In addition, prior to the issuance of a franchise, the City shall provide for the holding of a public hearing within the proposed franchise Area, following notice to the public, at which each applicant and its application shall be examined and the public and all interested parties afforded a reasonable opportunity to be heard. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.5 Construction provisions.

16.04.5.1 System Construction Schedule. Every franchise shall specify the construction schedule that will apply to any required construction, upgrade, or rebuild of the cable system. The schedule shall provide for prompt completion

of the project, considering the amount and type of construction required.

16.04.5.2 Use of Cable Operator's Facilities. The City shall have the right to install and maintain, free of charge upon any poles or in any conduit owned by a cable operator in the City, any wire and pole fixtures that do not unreasonably interfere with the cable system operations of the franchisee; provided that, if a franchisee is authorized to erect poles or place conduit, and the City uses a franchisee's conduit or poles to install a cable system that competes with that franchisee in the provision of cable service to residential subscribers, the franchise may provide that the franchisee may charge the City a fair market rate pursuant to that franchise for the use of the poles or conduit to provide residential cable service. Each cable operator shall notify the City when it enters into an agreement for use of its poles and conduits in the City. Copies of agreements for use of cable operator's conduits or poles in the public rights-of-way or on other public property shall be available for review upon the City's request.

16.04.5.3 Provision of Service/Quality of Service. In addition to satisfying such requirements as may be established in a franchise, every cable operator shall operate its cable system subject to the following conditions, except as prohibited by Federal law:

16.04.5.3.1 It is the policy of the City to ensure that every cable system provide service in the franchise area upon request to any person or any government building. Each cable operator shall extend service upon request within the City or (if smaller) its franchise area, provided that, a franchise may permit a franchisee to require a potential subscriber to contribute a fair share of the capital costs of installation or extension as a condition of extension or installation in cases where such extension or installation

may be unduly expensive. Service must be provided within time limits specified in Section 16.04.5.3.2.

16.04.5.3.2 Except as a franchise otherwise provides, a cable operator must extend service to any person or to any government building which requests it in the City or (if smaller) its franchise area (i) within seven days of the request, where service can be provided by activating or installing a drop; (ii) within 90 days of the request where an extension of one-half mile or less is required; or (iii) within six months where an extension of one-half mile or more is required. Provided that, in cases where a franchise permits a franchisee to require a potential subscriber to bear a share of extension or installation costs, and franchisee requires the potential subscriber to bear such costs, the time for extension shall be measured from the date the subscriber agrees to bear such costs or, if a franchisee requires prepayment of all or a portion of the estimated costs, from the date the prepayment is made. A franchisee that requires a potential subscriber to bear a portion of installation or extension costs must prepare a written estimate of extension costs within seven days of a request for an installation or extension that would be subject to cost-sharing.

16.04.5.3.3 A cable system within the City shall meet or exceed the technical standards set forth in 47 C.F.R. § 76.601 and any other applicable technical standards.

16.04.5.3.4 A cable operator shall perform all tests necessary to demonstrate compliance with the requirements of its franchise and other technical and performance standards established by applicable law. Unless a franchise or applicable law provides otherwise, all tests shall be conducted in accordance with federal rules and in accordance with the most recent edition of National Cable Television Association's "Recommended Practices for Measurements on Cable Television Systems," or such other

manual as may be directed under FCC regulations. A written report of any test results shall be filed with the City within seven days of a request by the City. If a location fails to meet technical or performance specifications, the operator, without requirement of additional notice or request from City, shall promptly take corrective action, and retest the locations.

16.04.5.3.5 Upon request of the City, every cable operator shall be required to interconnect with every other cable system and cable operator within the City on fair and reasonable terms for purposes of providing PEG and I-Net services.

16.04.5.4 System Maintenance. Scheduled maintenance shall be performed so as to minimize the effect of any necessary interruptions of cable service.

16.04.5.5 Continuity of Service. Each franchisee shall, during the term of the franchise, ensure that subscribers are able to receive continuous service. In the event the franchise is revoked or terminated, the franchisee may be required to continue to provide service for a reasonable period to assure an orderly transition of service from the franchisee to another entity. A franchise may establish more particular requirements under which these obligations will be satisfied. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.6 Operation and reporting provisions.

16.04.6.1 Communication with Regulatory Agencies. If requested by the City, a cable operator shall file with the City all reports required by the FCC including, without limitation, any proof of performance tests and results, Equal Employment Opportunity ("EEO") reports, and all petitions, applications, and communications of all types directly related to the cable system, or a group of cable systems of which the cable operator's cable system in the City is a part, submitted or received by the cable operator,

an affiliate, or any other person on the behalf of the operator, either to or from the FCC, the Security and Exchange Commission, or any other Federal or State regulatory commission or agency having jurisdiction over any matter affecting operation of the cable system; provided that, nothing herein requires a franchisee to produce regulatory or court filings that are treated by the agency or court as confidential, such as Hart-Scott-Rodino Act filings. Nothing in this Section 16.04.6.1 affects any rights the City may have to obtain books and records under Chapter 16.01.

16.04.6.2 Reports.

16.04.6.2.1 Within 45 days of the end of each calendar quarter, a cable operator shall submit a report to the City containing the following information:

16.04.6.2.1.1 The number of service calls (calls requiring a truck roll) received by type during the prior quarter, and the percentage of service calls compared to the subscriber base by type of complaint; and

16.016.04.6.2.1.2 The number and type of outages known by the operator for the prior quarter, identifying separately the following:

16.016.04.6.2.1.3 Each planned outage, the time it occurred, its duration, and the estimated area and number of subscribers affected;

16.04.6.2.1.4 Each known unplanned outage, the time it occurred, its estimated duration and the estimated area and the number of subscribers affected, and if known, the cause;

16.04.6.2.1.5 the total estimated hours of known outages as a percentage of total hours of cable system operation. an outage is a loss of sound or video on any signal, or a significant deterioration of any signal affecting two or more subscribers; and

16.04.6.2.2 No later than 90 days after the end of its fiscal year, a cable operator shall submit a written report that shall contain such information as may be required from time to time by the City, and at least the following, unless the City waives the requirement:

16.04.6.2.2.1 A summary of the previous year's activities in the development of the cable system, including descriptions of services begun or discontinued, the number of subscribers gained or lost for each category of cable service;

16.04.6.2.2.2 A summary of complaints for which records are required under Section 16.04.6.3.1, identifying both the number and nature of the complaints received and an explanation of their dispositions;

16.04.6.2.2.3 A fully audited or certified revenue report from the previous calendar year for the cable system.

16.04.6.2.2.4 An ownership report, indicating all persons who at the time of filing control or own an interest in the cable operator of 10 percent or more;

16.04.6.2.2.5 A list of officers and members of the Board of Directors of the franchisee and any affiliates directly involved in the operation or the maintenance of the cable system;

16.04.6.2.2.6 An organizational chart showing all corporations or partnerships with more than a 10 percent interest ownership in the cable operator, and the nature of that ownership interest (limited partner, general partner, preferred shareholder, etc.); and showing the same information for each corporation or partnership that holds such an interest in the corporations or partnerships so identified and so on until the ultimate corporate and partnership interests are identified;

16.04.6.2.2.7 An annual report of each entity identified in Section 16.04.6.2.2.6 which issues an annual report;

16.04.6.2.2.8 A complete report on its plant. This plant report shall state the physical miles of plant construction and plant in operation during the prior calendar year categorized as aerial and underground, identify any cases where subscribers contributed to plant extension, provide revisions to the cable system maps filed with the City, and report the results of appropriate electronic measurements to show conformity with FCC technical standards.

16.04.6.2.2.9 A report showing, for each cable customer service standard in force, the cable operator's performance with respect to that standard for each quarter of the preceding year. in each case where cable operator concludes it did not comply fully, the cable operator will describe the corrective actions it is taking to assure future compliance.

16.04.6.2.2.10 Once the information required by Sections 16.04.6.2.2.4-.6 has been filed, it need be refiled only if it changes.

16.04.6.3 Records required. A cable operator shall at all times maintain:

16.04.6.3.1 Records of all complaints received with information sufficient to allow the operator to prepare the reports required in this Section 16.04.6. The term "complaints" as used herein and throughout this ordinance refers to complaints about any aspect of the cable system or franchisee's operations, including, without limitation, complaints requiring service calls, and complaints about employee courtesy, billing, prices, programming, outages and signal quality;

16.04.6.3.2 Records of outages known to the cable operator, with information sufficient to allow a franchisee to prepare the reports required in this Section 16.04.6;

16.04.6.3.3 Records of service calls for repair and maintenance indicating the date and time service was

requested, the date of acknowledgment and date and time service was scheduled (if it was scheduled), and the date and time service was provided, and (if different) the date and time the problem was solved; and

16.04.6.3.4 Records of installation/reconnection and requests for service extension, indicating date of request, date of acknowledgment, and the date and time service was extended. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.7 Rate regulation and consumer protection.

16.04.7.1 Scope and Applicability. The City reserves all rights to implement and impose regulation of a Cable operator's rates and charges to the maximum extent permitted by law, and may do so by amendment to this ordinance, by separate ordinance, by amendment to a franchise, or in any other lawful manner.

16.04.7.2 Rate Regulation Procedures. Rate regulation shall be performed in accordance with the rules and regulations of the FCC. The City Manager may take any required steps to file complaints, toll rates, issue accounting orders or take any other steps required to comply with FCC regulations. The City Council shall be responsible for issuing rate orders that establish rates or order refunds. No rate may be put into effect without the prior review and approval of the City, except as federal law may otherwise require.

16.04.7.3 Rate discrimination prohibited . Except to the extent the City may not enforce such a requirement, a cable operator is prohibited from discriminating in its rates or charges or from granting undue preferences to any subscriber, potential subscriber, or group of subscribers or potential subscribers; provided, however, that a franchisee may offer temporary, bona fide promotional discounts in order to attract or maintain subscribers, so long as such discounts are offered on a non-discriminatory basis to similar classes of subscribers throughout the franchise area;

and a franchisee may offer discounts for the elderly, the disabled, or the economically disadvantaged; and such other discounts as it is expressly entitled to provide under federal law, if such discounts are applied in a uniform and consistent manner. A cable operator shall comply at all times with all applicable federal, state, and City laws, and all executive and administrative orders relating to non-discrimination.

16.04.7.4 Redlining prohibited. A cable system operator shall not deny access or charge different rates to any group of subscribers or potential subscribers because of the income of the residents of the local area in which such group resides.

16.04.7.5 Cable customer service standards. Each cable operator must satisfy cable customer service standards or consumer protection standards as may be set forth in its franchise. In addition, every franchise shall be deemed to include a requirement that the franchisee comply with such additional or stricter customer service standards or consumer protection laws as the City may establish from time to time by ordinance or resolution. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.8 Franchise fee.

16.04.8.1 Amount of Franchise Fee. A cable operator shall pay to the City a franchise fee in an amount equal to 5 percent of Gross Revenues, or such other amount as may be specified in the franchise; provided, however, that if the franchise specifies an amount, that amount shall be subject to increase should federal limits on fee payments be eliminated or changed and other Cable operators are subject to a higher fee. (Ord. 26053 § 1; passed April 15, 1997.)v

16.04.9 Transfers.

16.04.9.1 City Approval Required. No transfer shall occur without prior written notice to and approval of the City Council. Transfer without the prior written approval of the City shall be considered to impair the City's assurance of due performance. The granting of approval for a transfer in one instance shall not render unnecessary approval of any subsequent transfer.

16.04.9.2 Application.

16.04.9.2.1 The franchisee shall promptly notify the City of any proposed transfer involving a cable system. If any transfer should take place without prior notice to the City, the franchisee will promptly notify the City that such a transfer has occurred.

16.04.9.2.2 At least 120 calendar days prior to the contemplated effective date of a transfer involving a cable system, the franchisee shall submit to the City an application for approval of the transfer. Such an application shall provide complete information on the proposed transaction, including details on the legal, financial, technical, and other qualifications of the transferee, and on the potential impact of the transfer on subscriber rates and service. At a minimum, the following information must be included in the application, provided that, a franchisee is not required to duplicate information that it submits to the City to comply with its obligations under federal or state law:

16.04.9.2.2.1 All information and forms required under federal law or the equivalent of such forms if no longer required by federal law;

16.04.9.2.2.2 All information required in Sections 16.04.4.2.1 and 16.04.4.2.5-4.4.2.10 of this ordinance;

16.04.9.2.2.3 Any contracts or other documents that relate to the proposed transaction, and all documents, schedules, exhibits, or the like referred to therein;

16.04.9.2.2.4 Any shareholder reports or filings with the Securities and Exchange Commission ("SEC") that discuss the transaction;

16.04.9.2.2.5 other information necessary to provide a complete and accurate understanding of the financial position of the cable system before and after the proposed transfer;

16.04.9.2.2.6 Complete information regarding any potential impact of the transfer on subscriber rates and service;

16.04.9.2.2.7 A brief summary of the proposed transferee's plans for at least the next five years regarding line extension, plant and equipment upgrades, channel capacity, expansion or elimination of services, and any other changes affecting or enhancing the performance of the cable system.

16.04.9.2.3 For the purposes of determining whether it shall consent to a transfer, the City or its agents may inquire into all qualifications of the prospective transferee and such other matters as the City may deem necessary to determine whether the transfer is in the public interest and should be approved, denied, or conditioned as provided under Section 16.04.9.3. The franchisee and any prospective transferees shall assist the City in any such inquiry, and if they fail to do so, the request for transfer may be denied.

16.04.9.3 Determination by City. In making a determination as to whether to grant, deny, or grant subject to conditions an application for a transfer of a franchise under this Section 16.04.9.2, the City shall consider the legal, financial, and technical qualifications of the transferee to operate the cable system; any potential impact of the transfer on subscriber rates or services; whether the

incumbent cable operator is in compliance with its franchise and this title and, if not, the proposed transferee's commitment to cure such noncompliance; whether the transferee owns or controls any other cable system in the City, and whether operation by the transferee may eliminate or reduce competition in the delivery of cable service in the City; and whether operation by the transferee or approval of the Transfer would adversely affect subscribers, the public, or the City's interest under this title, the franchise, or other applicable law.

16.04.9.4 Transferee's agreement. No application for a transfer of a franchise subject to this Section 16.04.9 shall be granted unless the transferee agrees in writing that it will abide by and accept all terms of this title and the franchise, and that it will assume the obligations, liabilities, and responsibility for all acts and omissions, known and unknown, of the previous franchisee under this title and the franchise for all purposes, including renewal, unless the City, in its sole discretion, expressly waives this requirement in whole or in part.

16.04.9.5 Approval Does Not Constitute Waiver. Approval by the City of a transfer of a franchise pursuant to this Section 16.04.9 does not constitute a waiver or release of any of the rights of the City under this title or a franchise, whether arising before or after the date of the transfer.

16.04.9.6 Exception for intra-company transfers. Notwithstanding the foregoing, a franchise may provide that transfers to affiliates of a franchisee shall be excepted from the requirements of Section 16.04.9.1-16.04.9.2 where (1) the affiliate is wholly-owned and managed by an entity that will guarantee the performance under a franchise ; and (2) the transferee affiliate:

16.04.9.6.1 Notifies the City of the transfer at least 60 days before it occurs and, at that time provides the agreements

and warranties required by this Section 16.04.9, describes the nature of the transfer, and submits complete information describing who will have direct and indirect ownership and control of the cable system after the transfer;

16.04.9.6.2 Warrants that it has read, accepts and agrees to be bound by each and every term of the franchise and related amendment, regulations, ordinances, and resolutions then in effect;

16.04.9.6.3 Agrees to assume all responsibility for all liabilities, acts, and omissions known and unknown of its predecessor franchisees for all purposes, including renewal;

16.04.9.6.4 Agrees that the transfer shall not permit it take any position or exercise any right which could not have been exercised by its predecessor franchisees;

16.04.9.6.5 Warrants that the transfer will not substantially increase the financial burdens upon or substantially diminish the financial resources available to the franchisee (the warranty to be based on comparing the burdens upon and resources that will be available to the transferee compared to its predecessors), or otherwise adversely affect the ability of the franchisee to perform; and

16.04.9.6.6 Warrants that the transfer will not in any way adversely affect the City or subscribers (including by increasing rates);

16.04.9.6.7 Notifies the City that the transfer is complete within five business days of the date the transfer is complete; and

16.04.9.6.8 Agrees that the transfer in no way affects any evaluation of its legal, financial or technical qualifications that may occur under the franchise or applicable law after the transfer, and does not directly or indirectly authorize any additional transfers. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.10 Connections to cable system; use of antennae.

16.04.10.1 Subscriber Right To Attach. To the extent consistent with federal law, subscribers shall have the right to attach VCR's, receivers, and other terminal equipment to a franchisee's cable system. subscribers also shall have the right to use their own remote control devices and converters, and other similar equipment.

16.04.10.2 Removal Of Existing Antennae. A franchisee shall not, as a condition of providing service, require a subscriber or potential subscriber to remove any existing antenna, or disconnect an antenna except at the express direction of the subscriber or potential subscriber, or prohibit installation of a new antenna, provided that such antenna is connected with an appropriate device and complies with applicable law. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.11 Discrimination prohibited.

16.04.11.1 A cable system operator shall not discriminate among persons or the City or take any retaliatory action against a person or the City because of that entity's exercise of any right it may have under federal, state, or local law, nor may the operator require a person or the City to waive such rights as a condition of taking service.

16.04.11.2 A cable system operator shall not refuse to employ, discharge from employment, or discriminate against any person in compensation or in terms, conditions, or privileges of employment because of race, color, creed, national origin, sex, age, disability, religion, ethnic background, or marital status. A cable system operator shall comply with all federal, state, and local laws and regulations governing equal employment opportunities, as the same may be from time to time amended. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.12 Cable service, liquidated damages.

16.04.12.1 Liquidated Damages. Because a cable franchisee's failure to comply with the provisions of this title concerning cable service will result in injury to the City, and because it may be difficult to estimate the extent of each such injury, each cable franchise shall contain provisions for liquidated damages for the following violations, which provisions represent the best estimate of the damages resulting from injuries of specific types. The amounts of the liquidated damages set forth in this title are in 1997 dollars and shall be increased each year by the increase in the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Pacific Cities and U.S. City Average, Seattle, Urban Wage Earners and Clerical Workers Second Half Yearly Report; unless a franchise provides otherwise, the amount of liquidated damages shall be:

16.04.12.1.1 For failure to substantially complete construction in accordance with the franchise: $1.00 per day for each affected subscriber for each day the violation continues;

16.04.12.1.2 For transferring the franchise without approval: $500 per day for each violation for each day the violation continues;

16.04.12.1.3 For failure to comply with requirements for public, educational and governmental use of the System: $500 per day for each violation for each day the violation continues;

16.04.12.1.4 For violation of customer service standards: $500 per violation except that, for violations of applicable customer service standards for which the operator's compliance is not measured in terms of its response to individual customers, $1,250 per month for any period

during which it fails to meet applicable performance standards; and

16.04.12.1.5 For all other material violations of the franchise Agreement for which actual damages may not be ascertainable: $500 per day for each violation for each day the violation continues.

16.04.12.2 Procedures applicable to liquidated damages. Before it imposes liquidated damages:

16.04.12.2.1 The City shall provide the franchisee 30 days written notice and opportunity to fully cure the defect in performance, challenge the existence of the defect, or show that the defect in performance should be excused either temporarily or permanently; and

16.04.12.2.2 The City shall (at any time after the close of the 30-day period) hold a hearing at which the franchisee shall be provided an opportunity to be heard by the City Council.

Provided that, the franchisee may waive the public hearing requirement, and if so, the City may impose liquidated damages without holding that hearing. The conclusion of the process provided for in Sections 16.04.12.2.1 and 16.04.12.2.2 satisfies the City's obligation to provide notice before drawing upon the Security Fund. Written notice shall be provided by certified mail.

16.04.12.3 Revocation or termination of franchise.

16.04.12.3.1 In addition to all other rights of the City under a cable franchise, the City shall have the right to revoke the franchise: for the reasons specified in this title; for defrauding or attempting to defraud the City or subscribers; if the franchisee abandons the cable system, or willfully refuses to provide service to the City or any part of the City in accordance with its franchise; and as otherwise provided herein.

16.04.12.3.2 Failure to complete any system upgrade required by its franchise by the prescribed date so that at least 75 percent of all plant miles are rebuilt and are serving subscribers from the upgraded system will result in the automatic forfeiture of the franchise if (a) the City has provided the franchisee with notice that the upgrade must be completed, and (b) the upgrade is not completed within 90 days after the date on which the City provides notice so that at least 75 percent of all plant miles are rebuilt and are serving subscribers.

16.04.12.4 Remedies Cumulative. All remedies under this title and franchises granted hereunder are cumulative unless otherwise expressly stated. The exercise of one remedy shall not foreclose use of another, nor shall the exercise of a remedy or the payment of liquidated damages or penalties relieve the franchisee of its obligations to comply with its franchise. Remedies may be used singly or in combination; in addition, the City may exercise any rights it has at law or equity. Except that, the City is not entitled to recover damages for the same injury under two separate sections where doing so would result in a double recovery.

16.04.12.5 Relation To Insurance And Indemnity Requirements. Recovery by the City of any amounts under insurance, the construction/performance bond, the letter of credit, or otherwise does not limit the franchisee's duty to indemnify the City in any way; nor shall such recovery relieve the franchisee of its obligations under the franchise, limit the amounts owed to the City, or in any respect prevent the City from exercising any other right or remedy it may have. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.05

PRIVATE COMMUNICATIONS FACILITIES

Sections:

16.05.1 Application for License.

16.05.2 Conditions of License.

16.05.3 Compensation.

16.05.1 Application for License.

A person wishing to construct, emplace, operate, replace, reconstruct, or maintain a private communications system in a public right-of-way must obtain a license therefor. The license shall only authorize placement of the system in a specific portion of the public rights-of-way for a limited and specific purpose in connection with the person's business but not encompassing in whole or in part the carriage of telecommunications for hire in the public rights-of-way, and for a limited period of time. Such application must be in the form provided for by regulation and must be accompanied by a filing fee, as may be fixed by regulation, promulgated from time-to-time by the City. (Ord. 26053 § 1; passed April 15, 1997.)

16.05.2 Conditions of License.

Any license shall be subject to such conditions as the City may from time to time establish, shall be expressly subordinate to the use of the public rights-of-way by operators of communications facilities, and shall otherwise conform to the requirements of this title. Subject to the foregoing, the provisions of Chapter 16.01, Sections 16.01.6.1-16.01.6.5 shall apply to a private communications system as if it were a communications facility. (Ord. 26053 § 1; passed April 15, 1997.)

16.05.3 Compensation.

The owner of a private communications system shall pay a fee established by the City from time to time to reflect the fair market value of the property used. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.06

MISCELLANEOUS

Sections:

16.06.1 Captions.

16.06.2 Calculation of time.

16.06.3 Severability.

16.06.4 Cable customer service standards.
- 16.06.4.1 Telephone and office availability
- 16.06.4.2 Scheduling work
- 16.06.4.3 Notice to subscribers
- 16.06.4.4 Interruptions of service
- 16.06.4.5 Billing
- 16.06.4.6 Disconnection/downgrades
- 16.06.4.7 Deposits
- 16.06.4.8 Parental control option

16.06.5 Cable customer service standards - relation to other standards.

16.06.6 Customer service waiver.

16.06.1 Captions.

The captions to sections throughout this title are intended solely to facilitate reading and reference to the sections and provisions of this title. Such captions shall not affect the

meaning or interpretation of this title. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.2 Calculation of time.

Unless otherwise indicated, when the performance or doing of any act, duty, matter, or payment is required under this title or any franchise, and a period of time or duration for the fulfillment of doing thereof is prescribed and is fixed herein, the time shall be computed so as to exclude the first and include the last day of the prescribed or fixed period of duration time. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.3 Severability.

If any term, condition, or provision of this title shall, to any extent, be held to be invalid or unenforceable by a valid order of any court or regulatory agency, the remainder hereof shall be valid in all other respects and continue to be effective. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, said provision shall thereupon return to full force and effect without further action by the City and shall thereafter be binding on the franchisee and the City. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.4 Cable customer service standards.

16.06.4.1 Standards.

16.06.4.1.1 Telephone and office availability.

16.06.4.1.1.1 Each franchisee shall maintain an office at a convenient location in the City that shall be open for walk-in traffic at least ten hours per day (except legal holidays) Monday through Friday, with some evening hours, and at least five hours on Saturday to allow subscribers to pay bills, to drop off equipment and to pick up standard analog converters. Each franchisee shall perform service calls, installations, and disconnects at least ten hours per day Monday through Saturday, except legal holidays provided

that a franchisee shall respond to outages 24 hours per day, seven days per week. Each franchisee shall establish a publicly listed local toll-free telephone number. The phone must be answered by customer service representatives at least ten hours per day, Monday through Saturday, except legal holidays, for the purpose of receiving requests for service, inquiries, and complaints from subscribers. After such business hours the phone shall be answered so that customers can register complaints and report service problems on a 24 hour per day, seven day per week basis, and so that the franchisee can respond to service outages as required herein. Phones shall be answered in accordance with Section 16.06.4.1.1.2 hereof.

16.06.4.1.1.2 Telephone answering time shall not exceed 30 seconds or four rings, and the time to transfer the call to a customer service representative (including hold time) shall not exceed an additional 30 seconds. Under normal operating conditions, this standard shall be met 90 percent of the time, measured quarterly. Under normal operating conditions customers will receive a busy signal less than 3 percent of the time. When the business office is closed, an answering machine or service capable of receiving and recording service complaints and inquiries shall be employed. The after-hours answering service shall comply with the same telephone answer time standard set forth in this Section 16.06.4.1.1.2.

16.06.4.1.2 Scheduling work.

16.06.4.1.2.1 All appointments for service, installation, or disconnection shall be specified by date. Each franchisee shall specify a specific time at which the work shall be done, or offer a choice of time blocks, which shall not exceed four hours in length. A franchisee may also, upon request, schedule service installation calls outside normal business hours, for the express convenience of the customer. If at any time an installer or technician is

running late for an appointment and believes it will not be able to make a scheduled appointment time, an attempt to contact the customer will be made prior to the time of appointment and the appointment rescheduled at a time convenient to the customer, if rescheduling is necessary. It is the operator's burden to prove it met the appointment.

16.06.4.1.2.2 The franchisee shall offer and fully describe to subscribers who have experienced a missed appointment (where the missed appointment was not the subscriber's fault) that the subscriber may choose between the following options: installation or service call free of charge, if the appointment was for an installation or service call for which a fee was to be charged; one month of the most widely subscribed to Service Tier free of charge if an installation or service call was to have been provided free of charge; or one month of such service free of charge for other appointments.

16.06.4.1.2.3 With regard to disabled or handicapped customers, upon subscriber request, each franchisee shall arrange for pickup and/or replacement of converters or other franchisee equipment at the subscriber's address or by a satisfactory equivalent (such as the provision of a postage-prepaid mailer).

16.06.4.1.2.4 Under normal operating conditions, requests for service, repair, and maintenance must be acknowledged by a trained customer service representative within 24 hours, or prior to the end of the next business day, whichever is earlier. A franchisee shall respond to all other inquiries (including billing inquiries) within five business days of the inquiry or complaint. Under normal operating conditions, repairs and maintenance for outages or service interruptions must be completed within 24 hours after the outage or interruption becomes known to franchisee where the franchisee has adequate access to facilities to which it must have access in order to remedy the problem. Under

normal operating conditions, work to correct all other service problems must be begun by the next business day after notification of the service problem, and must be completed within five business days from the date of the initial request. When normal operating conditions do not exist, a franchisee shall complete the work in the shortest time possible. The failure of the franchisee to hire sufficient staff or to properly train its staff shall not justify a franchisee's failure to comply with this provision.

16.06.4.1.2.5 A franchisee shall not cancel a service or installation appointment with a customer after the close of business on the business day preceding the scheduled appointment.

16.06.4.1.2.6 Under normal operating conditions, the standards of Sections 16.06.4.1.2.4 and 16.06.4.1.2.5 shall be met at least 95 percent of the time, measured on a quarterly basis.

16.06.4.1.2.7 Under normal operating conditions, the installation time standard in Title IV, Section 1.5.3.2, and below will be met no less than 95 percent of the time measured on a quarterly basis:

Requests for additional outlets, service upgrades or other connections (e.g., DMX, VCR, A/B switch) separate from the initial installation will be performed within seven business days after an order has been placed.

16.06.4.1.3 Notice to subscribers.

16.06.4.1.3.1 A franchisee shall provide each subscriber at the time service is installed, clear and accurate written information: on placing a service call, filing a complaint, or requesting an adjustment (including when a subscriber is entitled to refunds for outages and how to obtain them); showing the telephone number of the City office responsible for administering the franchise; providing a schedule of rates and charges, channel positions, services

provided, a copy of the service contract, delinquent subscriber disconnect and reconnect procedures; notifying subscribers of the availability of parental control devices; and describing any other of the franchisee's policies in connection with its subscribers. The same information shall be provided to the subscriber annually thereafter, except another copy of the service contract need not be provided. Copies of the notices provided to the subscribers shall be provided to the City. Except as applicable federal, state and local rate regulations may provide to the contrary, a franchisee shall provide the City Manager at least 60 days' notice and all subscribers at least 30 days' notice of any significant changes in the information required to be provided under this Section 16.06.4.1.3. Such notice shall be made in writing.

16.06.4.1.3.2 Each franchisee shall take appropriate steps to ensure that all written franchisee promotional materials, announcements, and advertising of residential cable service to subscribers and the general public, where price information is listed in any manner, clearly and accurately discloses price terms. In the case of telephone orders, a franchisee shall take appropriate steps to ensure that price terms are clearly and accurately disclosed to potential customers in advance of taking the order.

16.06.4.1.3.3 Each franchisee shall maintain a file open for public inspection containing all notices provided to subscribers under these customer service standards, as well as all promotional offers made to subscribers. The notices and offers shall be kept in the file for at least one year from the date of such notice or promotional offer.

16.06.4.1.4 Interruptions of service. A franchisee shall provide 48 hours prior notice to subscribers and the City before interrupting service for planned maintenance or construction; provided, however, that planned maintenance that does not require more than two hours' interruption of

service and that occurs between the hours of 12:00 midnight and 6:00 a.m. shall not require such notice to subscribers, and notice to the City must be given no less than 24 hours prior to the anticipated service interruption.

16.06.4.1.5 Billing.

16.06.4.1.5.1 A franchisee's first billing statement after a new installation or service change shall be prorated as appropriate and shall reflect any security deposit.

16.06.4.1.5.2 A franchisee's billing statement must be clear, concise and understandable, must itemize each category of service and equipment provided to the subscriber and must state clearly the charge therefor.

16.06.4.1.5.3 A franchisee's billing statement must show a specific payment due date not earlier than the later of (1) 15 days after the date the statement is mailed; or (2) the 15th day of the 30-day period in which the service being billed is rendered. A late fee or administrative fee may not be imposed for payments before the due date. subscribers shall not be charged a late fee or otherwise penalized for any failure by a franchisee, including failure to timely or correctly bill the subscriber, or failure to properly credit the subscriber for a payment timely made.

16.06.4.1.5.4 A franchisee's bill must permit a subscriber to remit payment by mail or in person at the franchisee's local office.

16.06.4.1.5.5 The account of any subscriber shall be credited a prorated share of the monthly charge for the service upon subscriber request if a subscriber is without service or if service is substantially impaired for any reason for a period exceeding four hours during any 24 hour period; or automatically if the loss of service or impairment is for 24 hours or longer; except where it can be documented that a subscriber will obtain a refund for a loss of service or impairment which was caused by the subscriber or by

subscriber-owned equipment (not including, for purposes of this Section, in-home wiring installed by the franchisee).

16.06.4.1.5.6 Franchisee shall respond to all written billing complaints from subscribers within 30 days.

16.06.4.1.5.7 Refunds to subscribers shall be issued no later than (i) the earlier of the subscriber's next billing cycle following resolution of the refund request, or 30 days; or (ii) the date of return of all equipment to franchisee, if cable service has been terminated.

16.06.4.1.5.8 Credits for cable service shall be issued no later than the subscriber's next billing cycle after the determination that the credit is warranted.

16.06.4.1.6 Disconnection/Downgrades.

16.06.4.6.1 A subscriber may terminate service at any time.

16.06.4.1.6.2 A franchisee shall promptly disconnect from the franchisee's cable system or downgrade any subscriber who so requests. No period of notice prior to voluntary termination or downgrade of cable service may be required of subscribers by any franchisee. Charges for any voluntary disconnection, and any downgrade charges shall conform to applicable law.

16.06.4.1.6.3 Any security deposit and/or other funds due a subscriber that disconnects or downgrades service shall be returned to the subscriber within 30 days or in the next billing cycle, whichever is later, from the date disconnection or downgrade was requested except in cases where the subscriber does not permit the franchisee to recover its equipment, in which case the amounts owed shall be paid to subscribers within 30 days of the date the equipment was recovered, or in the next billing cycle, whichever is later.

16.06.4.1.6.4 A franchisee may not disconnect a subscriber's cable service for non-payment unless:

16.06.4.1.6.4.1 The subscriber is delinquent in payment for cable service;

16.06.4.1.6.4.2 A separate, written notice of impending disconnection, postage prepaid, has been sent to the subscriber at least 20 days prior to the date on which service may be disconnected, at the premises where the subscriber requests billing, which notice must state the date by which disconnection may occur, and the amount the subscriber must pay to avoid disconnection;

16.06.4.1.6.4.3 The subscriber has failed to pay the amounts owed to avoid disconnection by the date of disconnection; and

16.06.4.1.6.4.4 No pending inquiry exists regarding the bill to which franchisee has not responded in writing.

Payment is not delinquent until the fifteenth day of the month in which the service being billed for is rendered; the notice required under (ii) may not be sent to a subscriber prior to the delinquency date. If the subscriber pays all amounts due, including late charges, before the date scheduled for disconnection, the franchisee shall not disconnect service. After lawful disconnection, except in cases where disconnection is also subject to 16.01.6.5, upon payment by the subscriber in full of all proper fees or charges, including the payment of the reconnection charge, if any, the franchisee shall promptly reinstate service.

16.06.4.1.6.5 A franchisee may immediately disconnect a subscriber if (i) the subscriber is damaging, destroying, or unlawfully tampering with or has damaged or destroyed or unlawfully tampered with the franchisee's cable system; (ii) the subscriber is not authorized to receive a service, and is facilitating, aiding or abetting the unauthorized receipt of service by others; or (iii) subscriber-installed or attached equipment is resulting in signal leakage which is in violation of FCC rules, provided the subscriber has failed to

correct the leakage within three business days after receiving written notice of the problem from the franchisee. After disconnection, the franchisee shall restore service after the subscriber provides adequate assurance that it has ceased the practices that led to disconnection, and paid all proper fees and charges, including any reconnect fees and all amounts owed the franchisee for damage to its cable system or equipment.

16.06.4.1.6.6 Except as Federal or State law may otherwise provide, a franchisee may remove its property from a subscriber's premises within 30 days of the termination of service. If a franchisee fails to remove its property in that period, the property shall be deemed abandoned unless the franchisee has been denied access to the subscriber's premises, or the franchisee has a continuing right to occupy the premises under Federal or State statutes.

16.06.4.1.7 Deposits. A franchisee may require a reasonable, non-discriminatory deposit on equipment provided to subscribers. deposits shall be placed in an interest-bearing account, and the franchisee shall return the deposit, plus interest earned to the date the deposit is returned to the subscriber, less any amount the franchisee can demonstrate should be deducted for damage to such equipment.

16.06.4.1.8 Parental control option. Without limiting a franchisee's obligations under Federal law, a franchisee must provide parental control devices at no charge to all subscribers who request them that enable the subscriber to block the video and audio portion of any channel or channels of programming. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.5 Cable customer service standards -- relation to other standards.

Nothing in these standards shall be read to relieve a cable operator of an obligation to comply with federal, state or local consumer protection laws, to relieve an operator of an obligation to comply with stricter cable customer service standards, or to foreclose remedies that may be available to subscribers under applicable law. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.6 Customer service waiver.

The City Manager may grant a waiver of any or all of the customer service standards set out in Section 16.06.4 for a specified period of time, not to exceed two years if the City Manager finds (a) that application of a standard to a particular cable system is unnecessary or inappropriate because of the characteristics of the cable system (including size, or number of subscribers); and (b) the operator is willing to be bound by any alternative standards that the City Manager determines is necessary to provide adequate protection to subscribers. The waiver may be extended after a hearing reviewing the adequacy of the operator's customer service. (Ord. 26053 § 1; passed April 15, 1997.)